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~~No. A-1145~~

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 627,
Petitioner,

v.

GEORGE E. HOFFMAN & SONS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of the Case	
A. Summary of Facts	3
B. The Decisions of the District Court and the Court of Appeals	5
Reasons for Granting the Writ	7
Conclusion	17
Appendix A	
Decision of the Court of Appeals and Order on Rehearing	A-1
Appendix B	
Prior Decisions of the Court of Appeals and the District Court	A-31
Appendix C	
29 U S.C. § 158(b)(4), (A), (B) and (D)	A-69
Appendix D	
Order of the Supreme Court granting extension of time to file writ of certiorari	A-71

AUTHORITIES CITED

Cases:

American Boiler Mfrs. Ass'n v. NLRB, 404 F. 2d 547 (8th Cir. 1969) 10

Burston v. Caldwell, 506 F. 2d 24 (5th Cir. 1975) 16

Canada Dry Corp. v. NLRB, 421 F. 2d 906 (6th Cir. 1970) 10

Case v. Morrisette, 475 F. 2d 1300, 1306-1308 (D.C. Cir. 1973) 16

Cole v. Neaf, 334 F. 2d 326, 329-330 (8th Cir. 1964) 16

H. K. Porter Co. v. Goodyear Tire & Rubber Co., 437 F. 2d 244, 246 (6th Cir.) cert. denied, 404 U.S. 885 (1971) 16

Houston Insulation Contractors Ass'n v. NLRB, 386 U.S. 664 (1967) 7,11

Jenkins v. Louisiana State Bd. of Educ., 506 F. 2d 992 (5th Cir. 1975) 16

Leach v. Crucible Center Co., 388 F. 2d 176, 178-179 (1st Cir. 1968) 16

Meat and Highway Drivers, Local 710 v. NLRB, 335 F. 2d 709 (D.C. Cir. 1964)..... 10

National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967)..... 7

NLRB v. Int'l Longshoremen's Ass'n, ____ U.S. ____, 48 L.W. 4765 (1980) 7,8,9

NLRB v. Local 825, Int'l Union of Operating Engineers, 400 U.S. 297, 304 (1971)..... 7

NLRB v. Local Union No. 28, Sheet Metal Workers, 380 F. 2d 827 (2d Cir. 1967) 11

Orange Belt Dist. Council of Painters No. 48 v. NLRB, 328 F. 2d 534 (D.C. Cir. 1964) 11

Orvis v. Higgins, 180 F. 2d 537 (2d Cir.) cert. denied, 340 U.S. 810 (1950) 16

Pan American World Airways, Inc. v. Aetna Ca. & Sur. Co., 505 F. 2d 989 (2d Cir. 1974) 16

Pendergrass v. New York Ins. Co., 181 F. 2d 136, 138 (8th Cir. 1950) 15

Prendis v. Central Gulf Steamship Co., 330 F. 2d 893, 895 (4th Cir. 1963) 16

Quarles v. Fuque Indus., Inc., 504 F. 2d 1358, 1361 (10th Cir. 1974) 16

Ramey Construction Co. v. Local 544, Painters, 472 F. 2d 1127, 1136 (5th Cir. 1973) 15

Reyher v. Children's Television Workshop, 533 F. 2d 87 (2d Cir. 1976) cert. denied, 97 S. Ct. 492 (1977) ... 16

Smith v. United States, 502 F. 2d 512 (5th Cir. 1974) ... 16

UMW v. NLRB, 399 F. 2d 977 (D.C. Cir. 1968) 11

United States v. General Motors Corp., 384 U.S. 127, 141-142 n.16 14

United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) 16

United States v. Yellow Cab Co., 338 U.S. 338, 341 (1949) 14

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969) 13

Statutes:

28 U.S.C. § 1254(1) 2

Sec. 8(b), (4), (A), (B) and (D) of the Labor Management Relations Act of 1947 2

Miscellaneous:

Rule 52(a), Fed. R. Civ. P. 2,12,14,15,16

No. A-1145

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 627,
Petitioner,

v.

GEORGE E. HOFFMAN & SONS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 627, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case on March 31, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, as modified on rehearing, is not yet officially reported (*infra*, p. A-1-30). The earlier decision of the Court of Appeals is reported at 530 F. 2d 979. (*infra*, p. A-36-45) The Order of the United States District Court for the Southern District of Illinois, after trial of this case, is reported at 99 L.R.R.M. 3236. (*infra*, p. A-31-35) The earlier Orders of the District Court are reported at 352 F. Supp. 627 (*infra*, p. A-46-60) and 384 F. Supp. 1252 (*infra*, p. A-61-68)

JURISDICTION

The judgment of the Court of Appeals (*infra,* p. A-1-24) was entered on February 6, 1980. On March 31, 1980 the Court of Appeals modified its order of February 6, 1980 and denied Local No. 627's petition for rehearing. (*infra,* p. A-25-30) On June 25, 1980 Justice John Paul Stevens, upon application of Local No. 627, ordered that the time for filing a petition for writ of certiorari be extended to and including July 29, 1980. (*infra,* p. A-71) The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. When a local union and an employer are parties to a multi-employer, multi-union labor agreement, under the work preservation doctrine does the local union engage in unlawful, secondary activity when it strikes to preserve jobs within its geographical jurisdiction, which its members have traditionally performed?

2. When in conformity with the remand order of a court of appeals a trial court hears live testimony, makes credibility determinations, and finds that the motive for a local union's strike was the preservation of jobs traditionally performed by its members, does a court of appeals properly apply the clearly erroneous standard of Rule 52(a), Fed. R. Civ. P., when its summarily sets aside the trial court's factual finding of the union's subjective motive?

STATUTE INVOLVED

The relevant provisions of the Labor Management Relations Act of 1947 are Sections 8(b)(4), (A), (B) and (D), 29 U.S.C. § 158(b)(4), (A), (B) and (D). They are set out in the Appendix. (*infra,* p. A-69)

STATEMENT OF THE CASE

A. Summary Of Facts

This case arose out of a strike by Teamsters Local No. 627 (hereinafter referred to as the "Union") against George E. Hoffman & Sons, Inc. (hereinafter referred to as the "Company"). Both the Union and the Company were parties to Articles of Construction Agreement. Long Rock, C. A. Walker Truck Lines, and Winzler Trucking — three employers to whom the Company subcontracted work — were also parties to the Articles of Construction Agreement (hereinafter referred to as the "Agreement") (*infra*, p. A-42) The Agreement covers fourteen Teamster locals and contractors throughout the State of Illinois, and establishes a single multi-employer, multi-union bargaining unit. (*infra*, p. A-3)

Under the Agreement each Teamster local was recognized to have exclusive jurisdiction over certain counties in Illinois. Contractors were required to give notice of impending work to the local union with jurisdiction over the work area and to request the referral office serving the area to refer drivers available for employment. Generally, the referral office was to refer drivers from the top of the referral list, but the prospective employer could ask that specific drivers be referred first. (*infra*, p. A-3, 33)

The Company has historically employed the Union's members to perform hauling in connection with its construction projects; and a seniority list was kept of those Union members who had worked for the Company during the previous construction season. In February, 1971 and in March, 1971, the Company and the Union held pre-job conferences with respect to the upcoming construction season and in particular the Princeville project.[1] (*infra*, p. A-4) The Company provided the

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[1] The Princeville project site was located within the Union's geographical jurisdiction as was virtually all the hauling connected with it. (*infra*, p. A-3)

Union with a seniority list of drivers for the Union to refer as they were needed. The Union agreed that the Company could subcontract work to Long Rock, Winzler, and Walker provided, however, that the drivers on the Company's seniority list would work first. The subcontractors did not attend the pre-job, but were represented by the Company. The fact was inescapable that preserving the number of positions historically held by its members was important to the Union. (*infra,* p. A-33)

However, unbeknownst to the Union, the Company had sold five of its trucks without either replacing the trucks or making provisions to employ the number of the Union's drivers which would have been required to operate the trucks. As a consequence the Company violated a material part of the pre-job agreement. In addition, since the total amount of work to be completed was not affected by the truck sales, the work had to be farmed out to subcontractors. The subcontractors were thus doing work which the Union's drivers at the Company were entitled to and had done previously. (*infra,* p. A-34)

When the Union learned that the Company had sold its trucks, the Union cancelled the pre-job agreement and notified the Company that, pursuant to the Agreement, (1) the Company should not use drivers that were not members of the Union to perform work within the Union's jurisdiction, and (2) drivers who were the Union's members were to be cleared through the Union. Subsequently, in May, 1971 the Union filed a grievance protesting the Company's use of drivers in the Union's jurisdiction who were not members of the Union. The joint committee, which hears grievances pursuant to the Agreement, upheld the Union's grievance on June 10, 1971.

On June 16, 1971 the Union inquired whether the Company intended to comply with the joint committee's award. The Company stated that it would not comply with the award and that it would resume work using Long Rock and Walker's

drivers, who were members of another local union. On June 17, 1971 the Union commenced a strike, as permitted by the Agreement, against the Company for its failure to abide by the joint committee's award.

B. The Decisions Of The District Court And The Court Of Appeals

The district court originally granted summary judgment for the Company with respect to the issue of liability. The district court then conducted a trial limited to the issue of damages and entered judgment for the Company in the amount of $117,512.57.

The court of appeals reversed the district court's decision and remanded the case for trial. The court of appeals noted that the Union interpreted the pre-job agreement to guarantee that the Company's drivers — i.e., the Union's members — work first and that the Company was to see that this was done even after the trucks were sold. The court of appeals then stated:

> "If one accepts Local 627's interpretation, the strike must be perceived as an attempt to preserve jobs which rightfully belonged to the local's members which were traditionally held by them. In other words, the strike was of a primary nature and was not aimed at coercing Hoffman to take any course of action vis-a-vis its subcontractors." (*infra*, p. A-43)

The court of appeals also noted that conflicts in testimony involve a decision as to credibility and that such issues are traditionally reserved for the trier of fact. (*infra*, p. A-44)

On remand the district court conducted a trial on the issue of liability, which included extensive live testimony by Barker, the Union's principal officer. The district court found that Barker had no notice of the sale of the trucks at the time of the pre-job agreement and that preserving the number of jobs was important to the Union. (*infra*, p. A-33) The district court further

found that the motive of the Union's action was to preserve the jobs displaced by the Company's breach of the pre-job agreement, and that the Union's subsequent conduct was not inconsistent with this motive. Thus, the court concluded that the objective of the strike was to preserve jobs which were traditionally held by and rightfully belong to the Union's members. (*infra,* p. A-34)

A different panel of the court of appeals heard the second appeal in this case. Despite the trial court's finding that the Union's motive was to preserve jobs traditionally performed by its members, the court of appeals discredited Barker's testimony and found that the Union sought to prohibit the use of any Local 15 drivers by the Company's subcontractors. Thus, the second court of appeals panel, contrary to the trial court's findings, found that the strike was in part directed to the hiring practices of the subcontractors. (*infra,* p. A-13-15) The court of appeals additionally held that although the subcontractors, like the Company, were signatories to the Agreement and performing work for the Company within the Union's geographical jurisdiction, if the strike's object was to have the subcontractors use the Union's members, this was not an objective which fell within the scope of the work preservation doctrine. The court of appeals reasoned that Union's objective could not be work preservation because the Company was "a disinterested employer" with respect to work which it did not have the equipment to perform. (*infra,* p. A-15-20)

REASONS FOR GRANTING THE WRIT

1. The Court Of Appeals' Application Of The Work Preservation Doctrine Conflicts With This Court's Decisions

Under the work preservation doctrine, as enunciated in *National Woodwork Mfrs. Ass'n* v. *NLRB,* 386 U.S. 612 (1967), and its companion case *Houston Insulation Contractors Ass'n* v. *NLRB,* 386 U.S. 664 (1967), a union may exert pressure on an employer to preserve work traditionally performed or fairly claimable by the union's members. Even if the impact of this primary activity on "neutral employers" is severe and foreseeable, it is not thereby transformed into activity with a secondary objective. *National Woodwork Mfrs. Ass'n* v. *NLRB, supra* at 627; *NLRB* v. *Local 825, Int'l Union of Operating Engineers,* 400 U.S. 297, 304 (1971). The union's objective need not relate to the immediate bargaining unit where the primary activity occurs, so long as the goal is the preservation of work fairly claimable by the union's members. In *Houston Insulation Contractors Ass'n* v. *NLRB, supra,* a local union struck in support of the work preservation claims of a sister local which had a bargaining relationship with the same employer. A boycott, the Court held, does not become secondary because it is engaged in by employees not directly affected by the dispute. *Id.* at 669.

Subsequent to the second court of appeals decision in this case, the Court in *NLRB* v. *Int'l Longshoremen's Ass'n,* U.S. , 48 L. W. 4765 (1980), further explicated the work preservation doctrine. The focus of analysis, the Court held, must be on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work. The effect on the work opportunities of these other employees is irrelevant to the validity of the union's conduct. *Id.* at 4769. The validity of the work preservation agreement — or, as here, the union's conduct — is determined by whether the claimed work is historically and functionally related to the work traditionally performed by the union's members.

Thus, if the claimed work is sufficiently related to the work traditionally performed by the union, the union's object is lawful, work preservation, even if this has a severe impact on neutral employers and limits the work opportunities of employees not represented by the union.

The decision of the court of appeals in this case is at war with the foregoing principles. Traditionally, and under the Agreement, the Union had had exclusive jurisdiction over construction hauling within its geographical area. The Company's hauling within this territory had been performed by the union's members and during previous years the Company employed at least fourteen of the union's members. Once the Company engaged in the furtive sale of its trucks, the threat to the union's traditional work jurisdiction was immediate and severe. Where in the past the Union had had at least fourteen members employed at the Company, it now appeared that a substantial and growing part of that work would be performed by persons not represented by the Union. As a result of the Company's breach of the pre-job agreement, "[T]he subcontractors were thus doing some work which Local 627 employees at Hoffman, Inc. were entitled to and had done previously." (*infra*, p. A-34) When the Union first grieved the issue and then struck, it was merely reasserting its claim to work historically performed by its members, i.e., the Company's hauling for projects within the Union's geographical territory.

Applying the analytical framework of the *Longshoremen's* case, the traditional work performed by the Union's members was construction hauling within the Union's geographical territory for employers bound by the Agreement, including the Company. As a result of the Company's breach of the pre-job agreement, the Union was threatened with the loss of a portion of its traditional work, namely hauling for the Company's projects. Since the Union struck to retain hauling for the Company's projects within its geographical territory, there is not only a close relationship, but a complete identity between

the work which the Union's members traditionally performed and that which the Union sought to preserve.

The court of appeals, like the NLRB in the *Longshoremen's* case, committed the error of focusing on the work done by employees not represented by the Union, the employees of the subcontractors. The court of appeals, making its own findings of fact, concluded that the effect of the Union's demand would be to prohibit the use of Local 15 drivers employed by the subcontractors on the Princeville project. Likewise, however, the Union's demands in the *Longshoremen's* case would result in diminished work opportunities for employees not represented by the Union and working for consolidators. Indeed, the Rules on Containers would result in these employees losing work which they had previously performed. However, the Court held that the effect of the work preservation agreement on these employees' work opportunities was irrelevant.

Since the court of appeals based its analysis upon the effect of the Union's demands on employees it did not represent, rather than the relationship between the work traditionally performed by the Union's members and the work it sought to preserve; the court of appeals plainly failed to apply the work preservation doctrine as articulated by the Court.

2. A Conflict Exists Among The Courts Of Appeals With Respect To The Application Of The Work Preservation Doctrine

As noted above the Court in the *Longshoremen's* case held that a union may have a lawful work preservation objective even where the scope of its demand may result in a reduction in employment opportunities for persons not represented by the union. Similarly, the courts of appeals have held that where the type of work is fairly claimable by the union, its work preservation demand is lawful even where it will result in the acquisition of some work which had been performed by persons not represented by the union.

In *Canada Dry Corp.* v. *NLRB,* 421 F. 2d 907 (6th Cir. 1970), the union sought and obtained an agreement that its members would perform all shelving in supermarkets, even though the employees of other companies, represented by other unions, had previously performed some of this work. The court held that since the majority of this work was traditionally done by the union's members, the NLRB properly concluded that the additional work was not "so foreign to the unit as to negate the Clerks' assertion of a job protection object". In *Meat and Highway Drivers, Local 710* v. *NLRB,* 335 F. 2d 709 (D.C. Cir. 1964), the local union had lost much of its traditional work as a result of the movement of packinghouses out of the Chicago area. During negotiations the local union sought to have its members perform all deliveries into the Chicago area from out-of-state. Previously, these out-of-state deliveries had been performed by persons represented by other local unions. Despite this fact, the court of appeals held that the work in question was fairly claimable by the union, and therefore the union's object was primary. The court noted that "a union has always been free to bargain for the expansion of the employment opportunities within the bargaining unit". *Id.* at 714 Accord, *American Boiler Mfrs. Ass'n* v. *NLRB,* 404 F. 2d 547 (8th Cir. 1969)

The court of appeals' decision here is in direct conflict with the analysis of the Sixth, Eighth, and District of Columbia Circuits. The Union's members here had traditionally performed construction hauling within the Union's geographical territory. As a result of the Company's violation of the pre-job agreement, the Union was threatened with the loss of work traditionally performed by its members within its geographical territory. Yet, the court of appeals held that the Union's intent was secondary because the scope of the Union's demand was overbroad — i.e., the Union's action was secondary because of the quantity of work claimed from the primary employer. Under any interpretation of the Union's demand, however, it sought work traditionally performed by its members within its geographical territory. Thus, it was work fairly claimable by the

Union. Since the court of appeals focused its analysis upon the quantity of work claimed from the primary employer, rather than type of work which was fairly claimable by the Union, the court of appeals' decision is in conflict with the interpretation which at least three other circuits have given to the work preservation doctrine.

In addition the court of appeals' decision creates a conflict with respect to the applicable unit for which work preservation demands may be made. The court of appeals held that despite the fact that the Company as well as the three subcontractors were signatories to the same labor agreement, which in its preamble created a single multi-employer, multi-union bargaining unit, demands which related to work being performed by the subcontractors, were secondary.

Under *Houston Insulation Contractors Ass'n, supra,* a union's work preservation demands need not relate directly to employees in the bargaining unit where action in support of the demand occurs. Other courts of appeals have in addition held that work preservation demands may relate to the union's members with other employers. In *NLRB* v. *Local Union No. 28, Sheet Metal Workers,* 380 F. 2d 827 (2d Cir. 1967), the union, pursuant to a work preservation clause in the labor agreement, threatened to strike, unless components used on the construction site were fabricated by a company employing its members, rather than those of a sister local. The Second Circuit held that since the union's aim was to preserve work for its members working under two multi-employer labor agreements, the union's demand was primary under the work preservation doctrine. Another court of appeals has held that a union's demands are lawful and primary so long as the union's demands are "germane to the economic integrity of the principal work unit". *Orange Belt Dist. Council of Painters No. 48* v. *NLRB,* 328 F. 2d 534 (D.C. Cir. 1964); *UMW* v. *NLRB,* 399 F. 2d 977 (D.C. Cir. 1968).

In this case regardless of how one might precisely define the "bargaining unit", the principal work unit was construction hauling within the Union's geographical territory. All the subcontractors, in addition to the Company, were parties to a labor agreement which secured for persons on the Union's referral list work performed within its geographical territory. When an employer had work within the Union's jurisdiction, under the Agreement the employer either obtained a "clearance" from the Union or obtained drivers from the Union's referral list. Therefore, the union's demands, which, under any interpretation, related to the preservation of construction hauling within its geographical territory, were clearly "germane to the economic integrity of the unit".

The court of appeals' decision, then, conflicts with other circuits' decisions with respect to the lawful scope of a union's work preservation demand and the unit for which a union can properly make such demands. These unresolved issues are of vital importance in the construction industry where multi-employer, multi-union labor agreements prevail, and where work allocation is often based upon a local union's geographical jurisdiction.

3. The Court Of Appeals, Contrary To Rule 52(a), Decided De Novo Factual Issues Concerning Motive And Intent

Rule 52(a), Fed. R. Civ. P., requires appellate court affirmance of the trial court's findings of fact —

> "unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

This Court has reminded appellate courts that:

> "In applying the clearly erroneous standard to the findings of a district court setting without a jury, appellate courts must constantly have in mind that their function *is not to decide factual issues de novo* . . . The question for the ap-

> pellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed,' " [citations omitted]
>
> *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) [emphasis added]

Ignoring this Court's guidelines, the court of appeals here reweighed and reconsidered the same evidence that was before the trial court, and in effect, granted the Company *de novo* review of the trial court's findings of facts.

The trial court recognized that as a "threshold matter" it had to decide the factual questions involving the Union's motivation in calling the strike. (*infra,* p. A-33) This statement is in accord with the guidelines set down by the court of appeals in its remand order.[2] The trial court found on remand that *"the objective* of defendant's actions following his discovery of the truck sales was to preserve the jobs of the Hoffman, Inc. drivers displaced by the apparent breach of the pre-job agreement." (emphasis added; *infra,* p. A-34) The trial court completed its analysis of the Union's motivation by saying: "All the facts and circumstances lead me to believe that the strike was motivated by a desire to assert pressure on Hoffman, Inc. to compel conformity to the pre-job arrangement as understood by the Local and enforcing the arbitration decision of the Joint Committee." (*infra,* p. A-34)

In determining that the Union's motive was wholly primary, the trial court credited Union President Barker's testimony that he had no notice of the sale of the trucks until after the pre-job agreement. (*infra,* p. A-33) It also found that the Company violated the pre-job agreement, and that its subcontractors were

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[2] Wherein the court of appeals stated: "The critical issue is, therefore, the determination of Local 627's motivation in calling the strike. (*infra,* p. A-38)

doing work which the Company's Local 627 drivers were entitled to and had done previously. (*infra*, p. A-34) Again, the trial court was merely following the directive of the court of appeals when it remanded the case: "Resolution of conflicts in testimony involve a decision as to credibility . . . Testimony at trial affords the trier of fact an opportunity for the observation of demeanor." (*infra*, p. A-44) As it was instructed, the trial court resolved the credibility of Barker's testimony in favor of the Union. The court of appeals, then, not only second guessed itself on the scope of its directive on remand, but also overruled the trial court's credibility determinations.

What is particularly violative of Rule 52(a), Fed. R. Civ. P., is the type of findings which the court of appeals labeled as "clearly erroneous". As stated above, the trial court found that the Union's *object* and *motive* for calling the strike was to exert pressure on the Company, the primary employer. This Court has recognized the sanctity given to such findings:

> "Findings as to design, motive and intent with which men act depend pecularily upon the credit given to witnesses by those who see and hear them." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949)

This opportunity of the trial court to evaluate the demeanor and credibility of a witness is the primary rationale behind the directive contained in Rule 52(a), Fed. R. Civ. P., that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses". *United States* v. *General Motors Corp.*, 384 U.S. 127, 141-142 n. 16. The court of appeals reviewed the same oral testimony and accompanying written statements that the trial court did, but without the opportunity to observe Barker's demeanor, and found an illegal motive on the Union's part. (*infra*, p. A-13-15) Such an analysis

is at war with the "clearly erroneous" standard set forth in Rule 52(a), Fed. R. Civ. P.[3]

The court of appeals' *de novo* review of the testimony is similarly at odds with the primary function of an appellate court. The primary function of such a tribunal is not to find facts; rather, it is to interpret the law. The consequences of appellate courts serving as the "ultimate trier of fact issues" leads to a multiplicity of appeals and a derogation of the function of the trial court. See *Pendergrass* v. *New York Ins. Co.*, 181 F. 2d 136, 138 (8th Cir. 1950). The court of appeals in the instant case, instructed the trial court on remand to make a determination as to motive based on Barker's testimony and all other evidence. By reversing the trial court after it made such a determination, the court of appeals diminished the role of the trial court to the point of being merely a "warm-up" proceeding with the court of appeals being the main event. Again, such treatment of the findings of fact of the trial court ignores the directive contained in Rule 52(a), Fed. R. Civ. P.

In addition to the above discussed misapplication of Rule 52(a), Fed. R. Civ. P., the court should grant the writ because a conflict exists among the circuits with regard to the "clearly erroneous" standard and its application. The majority of the courts of appeals apply the clearly erroneous rule without regard to the character of the evidence received by the trial

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[3] The Fifth Circuit has recognized the deference that is afforded a trial court's decision on motive in *Ramey Construction Co.* v. *Local 544, Painters*, 472 F. 2d 1127, 1136 (5th Cir. 1973). In *Ramey*, the company appealed from a trial court's decision that the strike and picketing did not violate § 303. Affirming dismissal of the complaint, the Fifth Circuit aptly observed: "The finding of proper 'purpose' as with any subjective factual determination made by a trial court, must be given great weight by a reviewing court and, because of the equivocal nature of the facts here, we have relied a great deal on the district court's findings."

court.[4] However, the Second and Fifth Circuit courts of appeals have developed their own interpretations of the clearly erroneous standard. The Second Circuit consistently affords a trial judge's findings of fact less deference when they are premised upon non-oral testimony.[5] The Fifth Circuit has a completely different rule. It holds that the burden of showing a trial court's findings of fact to be clearly erroneous is reduced when the evidence is documentary or undisputed.[6]

It is apparent that the *de novo* review granted in the instant case by the Seventh Circuit is incompatible with the Second and Fifth Circuits' clearly erroneous standards and with the broad application of the clearly erroneous rule by the remaining circuits. Such a conflict in interpretation of the clearly erroneous rule is contrary to the goal of a definite and uniform application of Rule 52(a), Fed. R. Civ. P., called for by this Court in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

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[4] See, e.g., *Quarles* v. *Fuque Indus., Inc.*, 504 F. 2d 1358, 1361 (10th Cir. 1974); *Case* v. *Morrisette*, 475 F. 2d 1300, 1306-1308 (D.C. Cir. 1973); *H. K. Porter Co.* v. *Goodyear Tire & Rubber Co.*, 437 F. 2d 244, 246 (6th Cir.) *cert. denied*, 404 U.S. 885 (1971); *Leach* v. *Crucible Center Co.*, 388 F. 2d 176, 178-179 (1st Cir. 1968); *Cole* v. *Neaf*, 334 F. 2d 326, 329-330 (8th Cir. 1964); *Prendis* v. *Central Gulf Steamship Co.*, 330 F. 2d 893, 895 (4th Cir. 1963).

[5] See, e.g., *Reyher* v. *Children's Television Workshop*, 533 F. 2d 87 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 492, (1977); *Pan American World Airways, Inc.* v. *Aetna Cas. & Sur. Co.*, 505 F. 2d 989 (2d Cir. 1974); *Orvis* v. *Higgins*, 180 F. 2d 537 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950).

[6] See, e.g., *Jenkins* v. *Louisiana State Bd. of Educ.*, 506 F. 2d 992 (5th Cir. 1975); *Burston* v. *Caldwell*, 506 F. 2d 24 (5th Cir. 1975); *Smith* v. *United States*, 502 F. 2d 512 (5th Cir. 1974).

CONCLUSION

For the reasons stated above, this petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

In The
United States Court Of Appeals
For the Seventh Circuit

No. 78-2521

George E. Hoffman & Sons, Inc., a corporation of the State of Delaware,
Plaintiff-Appellant,

v.

International Brotherhood Of Teamsters, Chauffeurs, Warehousemen & Helpers Of America, Local No. 627, a labor organization,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Springfield Division. No. S 76-C-132—
J. Waldo Ackerman, *Judge.*

Argued June 6, 1979—Decided February 6, 1980

Before TONE and WOOD, *Circuit Judges,* and WILL, *Senior District Judge.**

TONE, *Circuit Judge.* This action by an employer against a local union under § 303 of the Labor Management Relations Act raises the question of whether a strike was protected by the work preservation doctrine extablished in *National Woodwork*

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* The Honorable Hubert L. Will, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

Manufacturers Association v. *NLRB*, 386 U.S. 612 (1967). The district court, after trial, held that it was. We disagree and reverse the judgment.

This is the second time the case has been before us. In an earlier, unpublished decision we reversed a summary judgment on the issue of liability in favor of the employer, and remanded for trial.[1] After trial on remand, the district court entered a judgment for the union.[2] The present appeal is from that judgment.

In 1970 plaintiff-appellant, George E. Hoffman & Sons, Inc., executed a contract with the State of Illinois to widen and resurface sections of two highways near Princeville, Illinois.[3] The work was to be done during the summer of 1971.

Hoffman arranged to subcontract part of the material hauling to three trucking firms, two of which were Long Rock Company and C. A. Walker Truck Lines, Inc.[4] Hoffman was to construct a portable asphalt production plant on Long Rock's property in Peoria, about two miles from the project site. The sub-

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[1] The district court's decision is reported as *George E. Hoffman & Sons, Inc.* v. *Teamsters Joint Council 65*, 352 F.Supp. 677 (S.D. Ill. 1973). Later the court tried and decided the issue of damages, *George E. Hoffman & Sons, Inc.* v. *Teamsters Local 627*, 384 F.Supp. 1252 (S.D. Ill. 1974). That issue was also before us on the prior appeal, but we did not reach it. Our decision is noted at 530 F.2d 979 (1976).

[2] *George E. Hoffman & Sons, Inc.* v. *Teamsters Local 627*, 99 L.R.R.M. 3236 (S.D. Ill. 1978).

[3] To the extent that the evidence is conflicting, we rely primarily on the testimony of Robert Barker, president and business representative of appellee Teamsters Local 627, since that is the only evidence referred to by the union to support the district court's decision.

[4] The ensuing difficulties, which we detail in text *infra*, did not involve the third subcontractor, Winzeler Trucking, Inc., because it employed only drivers from defendant Teamsters Local 627 on the Princeville project.

contractors were to transport stone, fly ash, and blow sand from various places to the asphalt plant. Long Rock and Walker Truck Lines were also to transport asphalt from the plant to the project site.

The drivers for Hoffman and the subcontractors were members of two locals of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Hoffman's drivers were all members of Local 627, the defendant in this case. Some Long Rock and Walker Truck Lines drivers were members of Local 627. Others were members of Local 15, which is not a party here.

Hoffman and the local unions were parties to a collective bargaining agreement, called the "Articles of Construction Agreement," which covered the period April 1, 1970 to April 1, 1973. The agreement had been negotiated between the Illinois Conference of Teamsters, representing Locals 627 and 15 as well as twelve other Teamsters locals in the state, and the Associated General Contractors of Illinois on behalf of its members, one of whom was Hoffman. Long Rock and Walker Truck Lines were not members of the Associated General Contractors. They separately and independently adopted the agreement after it had been negotiated and entered into by that association and the Conference of Teamsters.

The agreement contains a number of provisions pertinent to this case. Each Teamsters local was conceded to have exclusive jurisdiction over certain counties in Illinois.[3] Contractors were required to give notice of impending work to the local union with jurisdiction over the work area and to "request the Referral Office serving the area" to refer persons "available for employment." Generally, the referral office was to refer drivers

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[3] The project site and the asphalt plant were within Local 627's jurisdiction. Except for the sand hauled by Long Rock, all of the material transported to the asphalt plant under the three subcontracts also came from sources within Local 627's jurisdiction.

"from the top" of the referral list, but the prospective employer could ask that specific individuals be referred first. A "pre-job conference between the contractor the the Business Representative of the Local Union in whose territory the work is to be performed" was to be held for the purpose of resolving questions concerning the application of the agreement. As to subcontracting,

> The Contractor may hire or contract for the use of operated trucks be they from a fleet owner, another contractor or an owner driver, provided they do not replace his regular employees where he has the necessary equipment available.[6]

In February 1971 Robert Barker, president and business representative of Local 627, met with two Hoffman representatives in preparation for the upcoming paving season. In accordance with industry practice, Hoffman had terminated the employment of all its drivers at the end of the previous paving season and had yet to rehire any drivers. At the meeting Hoffman requested that the fourteen Local 627 members who had driven for it the previous year be referred first. The parties call the list of those men the "seniority list." Barker agreed to this request, and the union referred those men first during the 1971 season.

The previous season Hoffman had owned ten tandem trucks that had been operated by the men on the seniority list. Between mid-February and early March of 1971, Hoffman sold five of the trucks.

A "pre-job conference" for the Princeville work was held on March 3, 1971. At that time Barker approved Hoffman's subcontract with Long Rock although he knew that all except one of Long Rock's drivers were members of Local 15 rather than

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[6] "Regular employees" is not defined in the collective bargaining agreement.

627. According to Barker, Hoffman's general superintendent "agreed in the meeting that [Hoffman] employees would be working first." Shortly after the pre-job conference Barker met with a Walker Truck Lines representative and approved the company to do the work under the subcontract on condition that Walker "use [its] Local 627 drivers first and fill in with [its] Local 15 drivers . . . ." Barker then telephoned Hoffman and approved the subcontract with Walker Truck Lines.

The dispute that gave rise to this case began when, two weeks later, Barker learned that Hoffman had sold five of its ten tandem trucks. Believing that he had been "double crossed," Barker promptly complained orally to J. T. Hackler, Hoffman's general superintendent, and confirmed his complaint with the following telegram to Hoffman:

> I am now informing your company that you are not to use any drivers that are not members of Local 627 to do work in the jurisdiction of Local 627. Any drivers that are members of Local 627 must by [sic] cleared by myself. This is in accordance with the agreement between your company and Teamsters Local 627.

As Barker knew, Hoffman itself did not employ, within the jurisdiction of Local 627, any drivers who were not members of that local. Barker testified that he made the clearance demand so he could ensure that seniority list members would work before any other Local 627 members were hired.

Barker reasserted his complaint in mid-May, after Long Rock and Walker Truck Lines began hauling asphalt from the plant to the project site. He testified that in a telephone conversation with Hackler the following was said:

> I told him that I was up on the job site, that he had Walker and Long Rock trucks hauling on the site with Local 15 drivers and asked him if he had received a copy of the telegram that I had mailed him previously. He said yes .

> . . . I said do you have any intent of complying with my telegram, and he said no, he did not, and I told him that I was going to file a claim for backpay for the Hoffman drivers and people off of our referral list for all hours worked by the Local 15 people on this project.

Hackler "more or less" said that the matter "was out of his [Hackler's] hands, that he couldn't control it."

Barker's words, "the Hoffman drivers," apparently referred to the fourteen drivers who had been employed by Hoffman the previous season, *i.e.*, those on the seniority list. The status of those fourteen men as of May 4, 1971, before either subcontractor used Local 15 drivers wholly within Local 627's jurisdiction, was as follows: Ten had already been rehired by Hoffman. Two others were working regularly elsewhere. The remaining two were unemployed, but one had not been hired by Hoffman the preceding year until October 22.

Barker's phrase, "people off of our referral list," on its face, included any additional drivers Hoffman would have had to hire in order to perform itself all the hauling done by the subcontractors' Local 15 drivers. That this was Barker's meaning is confirmed by a grievance he filed against Hoffman a few days later pursuant to the arbitration provisions of the Articles of Construction Agreement. There he stated that "George Hoffman & Sons has trucks working in the Local 627 jurisdiction that do not belong to Local 627," and demanded "that Local 627 people be compensated for *all* hours worked by these outside drivers."(Emphasis supplied.) The "outside drivers" were, of course, the members of Local 15 employed by Long Rock and Walker Truck Lines. On June 10, 1971, the grievance committee, by a vote of five to one, "upheld" Barker's claim "from March 18, 1971, the date the Local Union sent the telegram." The dissenting member of the committee expressed the view that the grievance should have been filed against Long Rock and Walker Truck Lines, not Hoffman.

The evolution of the dispute into a strike was not long in coming. When Barker asked Hoffman for access to the payroll records of Long Rock and Walker Truck Lines, Hoffman responded that it did not have those records and did not intend to comply with the grievance committee award. On June 15, 1971, Local 627 called a strike against Hoffman. Pickets were placed at Hoffman's office in Peoria, at the construction site, and at the asphalt plant. Work was stopped on the Princeville project and all other Hoffman profects in Local 627's jurisdiction. Barker testified that the pickets were set up because of Hoffman's "failure to abide by the decision of the Joint Grievance Committee."

On July 1, 1971, the Associated General Contractors of Illinois filed unfair labor practice charges against Local 627, alleging violation of §§ 8(b)(4)(A), 8(b)(4)(B), and 8(b)(4)(D) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(A), (B), & (D). After the issuance of a complaint, the parties executed an informal settlement with respect to the alleged § 8(b)(4)(A) and § 8 (b)(4)(B) violations, and the Board dismissed the § 8(b)(4)(D) charge for lack of jurisdiction.[7] Hoffman did not appeal from that decision.[8]

At about the time that Hoffman commenced the unfair labor practice proceedings, it also filed the instant action for damages under § 303 of the Labor Management Relations Act, 29 U.S.C. § 187. In its complaint it alleged that Local 627's strike and picketing violated § 8(b)(4)(A), (B), and (D) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(A), (B), & (D).

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[7] *Teamsters Local 627,* 195 N.L.R.B. 93, 94 (1972)

[8] Although the Board ultimately concluded that the § 10(k) proceeding should be dismissed, it rejected the contention of Locals 627 and 15 that, because Local 15's secretary-treasurer disclaimed the work, there was no jurisdictional dispute. *Teamsters Local 627, supra* note 7, 195 N.L.R.B. at 94 & n.4.

Shortly thereafter Barker wrote to Hoffman, stating that

> The litigation you have recently commenced against this Local Union indicates a serious misunderstanding on your part as to the nature of our dispute with your company.
>
> . . .
>
> Our grievance was filed against your company only because Hoffman officials, . . ., have assumed responsibility for dealing with this Local Union with respect to the employment of our truck drivers connected with the job.[9]

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[9] Barker's letter in full is as follows:

> The litigation you have recently commenced against this Local Union indicates a serious misunderstanding on your part as to the nature of our dispute with your company.
>
> First, members of Local 627 have been and are on strike to enforce a final and binding decision of the Joint Grievance Committee against your company involving backpay for time worked by outside drivers, and for no other reason. Secondly, as you surely have realized, outside drivers mean truck drivers who have not been referred for employment or cleared by this Local Union's referral office. The Committee's decision, like the grievance on which it was based, is premised upon the duty of each contractor signatory to the current Articles of Construction Agreement to employ drivers from "the referral office serving the area in which the job is located", namely Local 627's Peoria referral office in this situation. Here, the drivers eligible for backpay happen to be members of our Local Union (although the contract does not require that they be so). Therefore, there is nothing in our grievance — or in the decision that sustains it — that compels your company to cease contracting with Long Rock Co., Inc. or C. A. Walker Trucking for hauling work involved in your Peoria county highway project. Each of these firms, as well as Winzeler Trucking, is signed to the Articles of Construction Agreement with this Local Union and otherwise qualifies as a subcontractor to your company for trucking work covered by our Agreement.

Richard Curren, Assistant to Hoffman's executive director, replied that "Hoffman has, and has had no control over the labor practices of [its subcontractors]."[10] There is no evidence, and Local 627 does not now contend, that Hoffman had any control over the subcontractors' hiring or ever assumed responsibility therefor in its dealings with Local 627.

Our grievance was filed against your company only because Hoffman officials, from the very inception of our dealings on this project, have assumed responsibility for dealing with this Local Union with respect to the employment of our truck drivers connected with the job. In fact, Long Rock Co., Inc., C. A. Walker Trucking, and Winzeler Trucking representatives did not even attend our pre-job conference or hold one of their own. Subsequently, at least one of these contractors informed us that your company had taken full charge of fulfilling his obligations to this Local Union on that job. You can surely understand, therefore, why we have, until now, looked to Hoffman for redress for all contract violations involving hauling work on your job.

If the situation changes or has changed in this regard, please advise the undersigned promptly. Thereafter, we will of course, no longer seek to hold Hoffman liable for contract violations by other contractors to whom it has properly let work. Rather, we will hold each signatory contractor responsible for its own violations in these circumstances.

We trust this clears up any confusion or misunderstanding that your company may have previously had with respect to the position of this Local Union.

[10] Curren's letter in full, dated August 3, 1971, is as follows:

Your letter to Geo. E. Hoffman & Sons, Inc., dated July 28, 1971, has been referred to me for reply, and to set the record straight:

(1) With regard to your letter's interpretation of the grievance award which you state you are striking to enforce, and your self-serving statement as to the premise on which it was based, both statements are inconsistent with and contradictory to your telegram on March 18, 1971, your written grievance, your statements to the Grievance Committee, and to the Hoffman Company after the award. Moreover it is quite apparent that your demands do amount to a requirement to cease doing business with the named subcontractors, within the meaning of the LMRA.

Shortly after these letters were exchanged, Local 627 ended its strike against Hoffman, some sixty-one days after it began. The strike caused Hoffman to lose thirty-four work days. When work on the paving project resumed, Walker Truck Lines used only Local 627 drivers for hauling fly ash and blow sand to the asphalt plant and asphalt to the project site. Long Rock continued to use Local 15 drivers to haul blow sand from Local 15's jurisdiction to the asphalt plant, but ceased hauling asphalt from the plant to the project site because it refused to request referral of Local 627 drivers.[11] Hoffman executed a subcontract with another company to assist Walker Truck Lines in hauling the asphalt, apparently one willing to use only Local 627 men.

The present action proceeded after the settlement of the strike, and reaches us for final disposition after a lengthy series of proceedings. Initially, the district court granted summary judgment in favor of Hoffman on the issue of liability. Later the court conducted a bench trial on the issues of damages, and entered a final judgment in favor of Hoffman for $117,512.57. *See* note 1 *supra*. In reversing that judgment by an unpublished decision, this court summarized the controlling issue as follows:

> Hoffman's claim for damages is dependent on the validity of its contention that the local's purpose in calling the strike was to force the company to cease doing business with subcontractors who did not use Local 627 drivers. A strike so motivated—directed at the prime contractor in

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(2) With respect to your statements concerning the relationship between Hoffman and Long Rock, Walker, and Winzeler, please be advised that Hoffman has, and has had no control over the labor relations policies and practices of those companies. This is not a change. You have already been advised that grievances involving the union membership of those companies' employees should have been directed to those companies, and you have dealt directly with those companies regarding such matters relative to the Princeville job.

[11] *Teamsters Local 627, supra* note 7, 195 N.L.R.B. at 94.

> order to exert pressure on it to stop dealing with its subcontractors—would constitute an illegal secondary boycott and entitled Hoffman to the recovery of damages, including lost profits, under section 303 of the LMRA. The critical issue is, therefore, the determination of Local 627's motivation in calling the strike. If the object of the local's activities was to force Hoffman to reform its contracts with its subcontractors so that work on the Princeville project would be reassigned to Local 627 drivers, the strike would not constitute protected activity under section 8(b)(4). If, however, as the local asserts, the strike was directed at Hoffman in an effort by the union to preserve for its members those jobs they had traditionally performed, its actions had the characteristics of primary activity and are thus protected from a suit for damages under section 303, which applies only when an employer is injured due to a violation of section 8(b)(4)'s prohibition against secondary activity.

(Footnote omitted.) The court held that "the object of the strike was not a matter which was capable [of] determination at the summary judgment stage."

After a bench trial on remand before a different judge of the district court, judgment was entered in favor of Local 627. The court found that "the objective of [Barker's] actions following his discovery of the truck sales was to preserve the jobs of Hoffman, Inc. drivers displaced by the apparent breach of the prejob atreement." *George E. Hoffman & Sons, Inc.* v. *Teamsters Local 627, supra* note 2, 99 L.R.R.M. at 3238. Although noting that it was "necessary to assure that . . . the defendant's reactions did not become overbroad so as to encompass other, impermissible objectives," *id.*, the court did not state in its findings that the union's sole object was work preservation. Instead, the court said:

> All of the facts and circumstances lead me to believe that the strike was motivated by a desire to assert pressure on Hoffman, Inc. to compel conformity to the pre-job arrangement as understood by the Local and enforcing the arbitration decision of the Joint Committee.

Id.

I.

The controlling legal principles are well settled. Only "secondary" conduct is proscribed by §§ 8(b)(4)(A) and 8(b)(4)(B). Those provisions are aimed at "shielding unoffending employers and others from pressures in controversies not their own." *NLRB* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 692 (1951) (quoted in *National Woodwork Manufacturers Association* v. *NLRB,* 386 U.S. 612, 626-27 (1967). *See also Kable Printing Co.* v. *NLRB,* 545 F.2d 1079 (7th Cir. 1976). A court must decide whether "under all the surrounding circumstances" a stike is directed at "the labor relations of the contracting employer *vis-a-vis* his own employees" or is "tactically calculated to satisfy union objectives elsewhere." *National Woodwork Manufacturers Association* v. *NLRB,* 386 U.S. at 644-45; *see NLRB* v. *Enterprise Association of Pipefitters Local 638,* 429 U.S. 507, 528 (1977).[12]

To be lawful a strike must be for objectives wholly "primary." Any "secondary" objective will bring the union's action within the reach of § 8(b)(4). *NLRB* v. *Enterprise*

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[12] For further elaboration of this test, see *National Woodwork Mfrs. Ass'n* v. *NLRB,* 386 U.S. 612, 630-31, 645 (1967); *Plumbers Local 342* v. *NLRB,* 598 F.2d 216, 220 (D.C. Cir. 1979); *Griffith Co.* v. *NLRB,* 545 F.2d 1194, 1200 & n.10 (9th Cir. 1976), *cert. denied,* 434 U.S. 854 (1977).

Association of Pipefitters Local 638, 429 U.S. at 530 n.17;[13] *NLRB* v. *Denver Building & Construction Trades Council,* 341 U.S. at 689 & n.18.

The district court in this case did not address specifically the question of whether the strike's objectives were wholly primary or in part secondary. The court did, as we have noted, find that the objective was work preservation and hold that consequently the strike was lawful. We must assume that the court was aware of the legal principles just summarized and, accordingly, that the court intended to find that the objective was wholly primary.

II.

A.

Local 627's first contention is that the sole objective of the strike was to preserve the jobs its members would have had if Hoffman had not sold the five trucks.[14] Hoffman has conceded that if the strike was thus limited, it was permissible as work

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[13] In *Enterprise Association,* the Court said, quoting in part from *NLRB* v. *Denver Bldg. & Constr. Trades Council, supra,* 341 U.S. at 689:

> "It is not necessary to find that the *sole* object of the strike" was secondary so long as one of the union's objectives was to influence another employer by inducing the struck employer to cease doing business with that other employer.

429 U.S. at 530 n.17. *See also NLRB* v. *Milk Wagon Drivers' Local 753,* 355 F.2d 326, 329 (7th Cir. 1964).

[14] Our conclusion, *infra,* as to the scope of the union's objectives, renders irrelevant that which was seen as an important fact question in the previous appeal, *viz.,* whether Barker knew at the time of the pre-job conference that the five trucks had been sold.

preservation. Assuming that the district court intended to make such a finding, however, that finding is clearly erroneous.[15]

The record clearly establishes that Barker's demands, although apparently triggered by the sale of the five trucks, were not merely for the jobs lost to Local 627 members by reason of that sale. The demands were that no Local 15 drivers be permitted to drive.

Barker's oral and written statements described above, including his written grievance, demand that all drivers working on the project wholly within Local 627's jurisdiction be Local 627 members. He made no reference in those statements to the jobs the five additional trucks would have made available. Instead, he specifically objected to the presence of any Local 15 drivers on the job site and made the unqualified demand that none be employed there.

In addition, no underlying correlation exists between these demands and the jobs attributable to the five trucks. Barker did not assert, nor does the union now assert, that prohibiting use of any Local 15 drivers by subcontractors was equivalent in effect to regaining the jobs the five sold trucks would have provided Local 627 drivers. The hauling on the project could easily have exceeded, and in fact did exceed even prior to the strike,[16]

[15] As we have already noted, the district court, while it made the general finding that the objective of the strike was work preservation, did not make concrete findings concerning the objective of the strike.

The union also argues that the record supports a more limited conclusion: that the strike was to preserve jobs lost because of the sale only for its members on Hoffman's seniority list. The evidence we cite in text to show that the union's broader contention is not supported by the evidence, of course, disposes of this argument as well.

[16] Exhibits in evidence show that on at least four of the twenty-three days that the two subcontractors worked on operations wholly within Local 627's jurisdiction they would have needed to use trucks driven by Local 15 members even if Hoffman had had ten trucks. We assume in so stating that Barker's objections did not extend to Long

the combined capacities of the ten trucks Hoffman would have owned if none had been sold and the subcontractors' trucks driven by Local 627 members.[17] Consequently, subcontractors' trucks driven by Local 15 members would have been needed to work on the project even if Hoffman had not sold the five trucks.[18] No showing was made that Barker expected otherwise at any time before the strike. Thus the record could not support a finding that the union was concerned only with providing its members with jobs that would have resulted from Hoffman's retention of those five trucks.

B.

Local 627's alternative position is that even if its objective was not limited to requiring that its members do the work Hoffman would have done if the trucks had not been sold, but extended to coercing Hoffman into refusing to deal with subcontractors who did not employ exclusively Local 627 drivers on the

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Rock's use of Local 15 drivers in the hauling of blow sand from Local 15's jurisdiction to the asphalt production plant. The record supports this assumption, as do the fact findings of the National Labor Relations Board in the separate unfair labor practice proceeding, *Teamsters Local 627, supra* note 7, 195 N.L.R.B. at 94.

[17] Both Long Rock and Walker Truck Lines had Local 627 members as well as Local 15 members working on the Princeville project. As noted above, the latter promised Barker that its Local 627 members would work first on the project. We are assuming that that actually occurred and that the same was true for Long Rock.

[18] The union correctly points out that the existence of foreseeable secondary consequences does not always mean that an object of a strike is to change the hiring practices of the secondary employer. *NLRB* v. *Local 825, International Unionof Operating Engineers,* 400 U.S. 297, 304-05 (1971); *National Woodwork Mfrs. Ass'n* v. *NLRB, supra* note 12, 386 U.S. at 627; *Local 644, United Bhd. of Carpenters* v. *NLRB,* 533 F.2d 1136, 1149-50 n.35 (D.C. Cir. 1975). The presence here of significant effects on the subcontractors, together with the scope of the union's demands, requires the conclusion that the strike was partly directed to the hiring practices of the subcontractors.

Princeville project, its action was nonetheless primary.[19] It is argued that Hoffman, Long Rock, and Walker Truck Lines were parties to the Articles of Construction Agreement, and that therefore Local 627's "efforts to preserve, protect or recapture the traditional work of Local 627 drivers" anywhere within its territorial jurisdiction, as defined in the agreement, should be regarded as primary.[20]

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[19] As stated earlier, despite Barker's assertion in his July 28 letter that Hoffman had assumed responsibility for subcontractors' dealings with Local 627 for the project, the union does not now argue that this was so or that Hoffman should be held responsible for the hiring practices of Long Rock and Walker Truck Lines on this basis. Both appear from the record to have been independent companies whose driver assignments were not subject to Hoffman's control.

[20] The union also argues, although not in detail, that all the material hauling work was "fairly claimable" from Hoffman and thus a permissible primary object of union efforts. *See Meat & Highway Drivers Local 710* v. *NLRB*, 335 F.2d 709, 714 (D.C. Cir. 1964). Traditionally, union members had done material hauling for Hoffman within the local's territorial jurisdiction. Such hauling was thus "a type [of work] which the men in the bargaining unit have the skills and experience to do." *Id.* According to the union, because material hauling was not a type of work differing from what union members had done, the local could permissibly lay claim to all such hauling on Hoffman's jobs within its jurisdiction.

Even if we accept the local's argument, there is still the question of whether a union's actions may be secondary because of the quantity of the work claimed from the primary employer. We need not consider that issue here, however, since the record shows that the local was attempting not to persuade Hoffman to do all its material hauling but to have the subcontractors use Local 627 members on the project within the local's jurisdiction. Nowhere is there any indication that Barker asked Hoffman to buy or rent additional trucks sufficient for all the hauling work. Instead, his concern was with the subcontractors' use of Local 15 drivers on their own trucks.

To be justified by the work preservation doctrine, a strike objective must be directed against an employer who is not disinterested with respect to that objective. In adopting the secondary boycott provisions, "Congress was not concerned to protect primary employers against pressures by disinterested unions, but rather to protect disinterested employers against direct pressures by any union."[21] *Houston Insulation Contractors Association* v. *NLRB,* 386 U.S. 664, 668 (1967) (quoting *United Association of Journeymen Local 106,* 110 N.L.R.B. 206, 209 (1954)).[22] If Hoffman, the target of Local 627's strike, was disinterested with respect to an object of the strike, it was entitled to the protection of the statute.

The union's argument that Hoffman was not disinterested is based on the fact that the two subcontractors had signed collective bargaining agreements identical to the Articles of Construction Agreement, which Hoffman had signed. This, however, did not make Hoffman an interested party to Local 627's dispute with the subcontractors. Hoffman and the subcontractors were independent, unaffiliated companies. Neither of the subcontractors was a member of the Associated General Contractors, which had negotiated the Articles on Hoffman's behalf, and neither was shown by the evidence to have been represented by that association in negotiating the Articles or for any other purpose.[23] The Articles contain a specific disclaimer

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[21] Similar reasoning underlies the "ally doctrine," *see, e.g., Kable Printing Co.* v. *NLRB, supra,* 545 F.2d at 1084-85.

[22] *Houston Insulation,* a companion case to *National Woodwork,* held primary a strike by employees of one bargaining unit to preserve work for union members in a separate bargaining unit with the same employer.

[23] Local 627 seems to dispute this conclusion on the basis of the preamble to the Articles of Construction Agreement. The point was only raised in oral argument, so we do not know what particular provision of the preamble the union relies on. The only passage that provides any support at all for the assertion is found in paragraph three:

of joint liability.[24] Absent action as a group by employers who have signed the same contract, an employer signatory is not responsible for individual decisions of its co-signatories or subject to economic retaliation for their individual actions. *Griffith Co.* v. *NLRB*, 545 F.2d 1194, 1195-96 & 1200-01 (9th Cir. 1976), *cert. denied*, 434 U.S. 854 (1977).[25] Local 627 has cited no

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> the parties desire and intend this to be a multi-employer, multi-union negotiated agreement established for the classes of employees involved who work in the same area of identical wages, hours and working conditions, regardless of the contractor for whom they work or the Local Union which represents them.

The context in which this passage is found makes it plain that it is only relevant to members of the Associated General Contractors. For example, paragraph four immediately succeeding the passage quoted above is as follows:

> As a means of accomplishing the objectives and purposes stated in Paragraph 3 above, the Association has been authorized to negotiate the terms and provisions of this Agreement for and on behalf of its members and the Conference has likewise been authorized to so negotiate for and on behalf of the Local Unions.

[24] The Articles provide,

> It is further agreed that the liability of the Employers who accept, adopt or sign this Agreement, or a fascimile thereof, shall be several and not joint . . . .

[25] Individual adoption of a contract negotiated by a multi-employer bargaining unit does not, without more, make the individual signatory a member of the multi-employer unit. *See Moveable Partitions, Inc.*, 175 N.L.R.B. 915, 916 (1969); *Raymond O. Lewis*, 148 N.L.R.B. 249, 253-55 (1964). If Long Rock and Walker Truck Lines had been part of the multi-employer bargaining unit, at least some support would have existed for Local 627's actions. *See, e.g., Local 644, United Bhd. of Carpenters* v. *NLRB, supra* note 18, 533 F.2d at 1157-58 (Leventhal, J., dissenting); *Local 98, Sheet Metal Workers' Int'l Ass'n* v. *NLRB*, 433 F.2d 1189, 1199-1201 (D.C. Cir. 1970) (Skelly Wright, J., dissenting).

authority to the contrary,[26] and our research has revealed none.[27]

Thus Local 627's strike was in part secondary. The dispute over the part of the work that Hoffman was never equipped to do itself and that no one ever contemplated Hoffman would do itself was between Local 627 and the subcontractors. As to that dispute and that work, Hoffman was a disinterested employer in the same position as the employer granted protection in *NLRB* v. *Local 825, International Union of Operating Engineers,* 400 U.S. 297, 304-05 (1971). *See also, e.g., Local 644, United Brotherhood of Carpenters* v. *NLRB,* 533 F.2d 1136 (D.C. Cir. 1975).

The union's illegal demands cannot be saved by reliance on the pre-job agreement or the arbitration award. Coercing Hoffman to construe the pre-job agreement as requiring termination of the subcontractors unless they agreed to use only Local 627

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[26] *American Boiler Mfrs. Ass'n* v. *NLRB,* 404 F.2d 547 (8th Cir. 1968), *cert. denied,* 398 U.S. 960 (1970), the only case cited in support of this argument, is inapposite. That case did not involve any attempt to enforce a work preservation agreement against one employer signatory by striking another. Nothing in the court's decision suggests that a strike against one employer to secure compliance with the agreement by another would be deemed "primary."

[27] In *International Union of Operating Engineers Local 12,* 212 N.L.R.B. 343 (1974), *rev'd sub nom. Griffith Co.* v. *NLRB,* 545 F.2d 1194 (9th Cir. 1976), *cert. denied,* 434 U.S. 854 (1977), the Board did hold to be permissible union efforts to enforce a contract provision that effectively required general contractor association members to refrain from doing business with subcontractors that had signed the master labor contract individually and were "delinquent in their payments to the several fringe benefit trust funds jointly maintained and administered by the Union and the signatory Employers." 212 N.L.R.B. at 343. The Ninth Circuit reversed, however, reasoning in part that the agreement and its enforcement against the general contractor were aimed at the labor relations of the delinquent subcontractor. 545 F.2d at 1200-01.

members on the job was illegal under § 8(b)(4)(A) or § 8(b)(4)(B).[28] Similarly, that the objective was stated in terms of enforcing a grievance award purporting to require compliance with such an agreement does not save the strike.[29]

III.

Hoffman also argues that Local 627's strike was within § 8(b)(4)(D) of the Act, 29 U.S.C. § 158(b)(4)(D), which provides generally that it is an unfair labor practice to engage in or encourage a strike where "an object" thereof is to force or require an employer to assign work to a particular labor organization. This provision, like § 8(b)(4)(A) and § 8(b)(4)(B), is intended to discourage labor organizations from drawing employers into controversies not their own. Union efforts to force an employer

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[28] See *Carrier Air Conditioning Co.* v. *NLRB*, 547 F.2d 1178, 1185-86, 1188-90 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977); *NLRB* v. *Milk Wagon Drivers' Local 753*, *supra* note 13, 335 F.2d at 329.

[29] Indeed, seeking a grievance award for secondary objectives could have been an unfair labor practice under § 8(b)(4)(B), even if there had been no strike. *See, e.g., Electro-Coal Transfer Corp.* v. *General Longshore Workers Locals 1418 & 1419*, 519 F.2d 284, 289 (5th Cir. 1979); *Carrier Air Conditioning Co.* v. *NLRB*, *supra* note 28, 547 F.2d at 1191-93; *Associated General Contractors, Inc.* v. *NLRB*, 514 F.2d 433, 438-39 (9th Cir. 1975).

At oral argument Local 627 asserted that the construction industry proviso to § 8(e) was applicable to the asphalt hauling. The district court made no findings of fact as to the nature of the work performed by the drivers who delivered the asphalt to the project site. Even if we assume that the hauling of hot asphalt requires some work to be done at the project site, the proviso does not appear to apply. *See Drivers Local 695* v. *NLRB*, 361 F.2d 547, 552-53 (D.C. Cir. 1966) (delivery of ready-mix concrete to project site, where driver often mixes the concrete, is not work done at construction site for purposes of § 8(e) proviso); *NLRB* v. *Teamsters Local 294*, 342 F.2d 18, 21-22 (2d Cir. 1965) (same); *Joint Council of Teamsters No. 42*, 225 N.L.R.B. 208, 216-17 (1976) (same).

to pressure another employer into assigning work to one labor organization rather than another violate both § 8(b)(4)(B) and § 8(b)(4)(D). *See NLRB* v. *Local 825, International Union of Operating Engineers, supra,* 400 U.S. at 305-06; *Teamsters Local 216* v. *NLRB,* 520 F.2d 172, 180 (D.C. Cir. 1975).

As noted above, the Associated General Contractors filed charges with the NLRB on Hoffman's behalf, asserting that Local 627's strike against Hoffman was an unfair labor practice as defined in § 8(b)(4)(D) and other provisions of the Act.[30] Although dismissing the § 8(b)(4)(D) charge on jurisdictional grounds, the Board found that there was a jurisdictional dispute between Local 627 and Local 15.[31] The disputed work was said to be the following:

> All truck driving duties related to the project of widening and resurfacing the fifteen mile stretch of Illinois Routes 90 and 91 near Princeville, Illinois, performed by Long Rock Stone Company or by C. A. Walker Truck Lines, Inc.

Teamsters Local 627, supra note 7, 195 N.L.R.B. at 93 n.1. According to the district court, however, § 8(b)(4)(D) was not violated because "[a] reasonable view of the facts in this case is that Local 627 was picketing to prevent their employer from continuing to assign to Local 15 work which had originally been assigned to Local 627." 99 L.R.R.M. at 3238.

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[30] *See* text at note 7 *supra.*

[31] *See* note 8 and accompanying text *supra.*

The question was litigated, but its resolution was unnecessary for the Board's decision. Therefore, the finding is not preclusive. *See generally Restatement (Second) of Judgments* § 68, Comment h, § 68.1(a), Comment a (Tent. Draft No. 4, 1977); F. James & G. Hazard, *Civil Procedure* §§ 11.18-11.19 (2d ed. 1977). Before the district court, both parties disclaimed any reliance on the NLRB decision.

Such a view of the facts was clearly erroneous, in light of the evidence summarized above and the NLRB's contrary finding. A violation of § 8(b)(4)(D) was therefore established.

IV.

Although there is no judgment for damages before us, the posture of the case makes it necessary to determine the issue of damages. In a separate trial on that issue held before the first appeal, the district court awarded Hoffman $117,512.57. *George E. Hoffman & Sons, Inc.* v. *Teamsters Local 627,* 384 F. Supp. 1252 (S.D. Ill. 1974). Hoffman argues that if we hold the union liable we should declare that award inadequate. Neither Hoffman nor the union wishes a new trial on damages. Both ask that we decide the damages issue on the record before us.

The district court allowed some kinds of claimed damages and disallowed others. The damages allowed were in three categories: certain expenses incurred because of the strike; lost profits on sales of materials and on additional patching work that the strike prevented; and lost profits that would have been earned if the strike had not prevented Hoffman from performing contracts it had entered into.

The disallowed damages were of two kinds. Damages allegedly caused by delays on certain projects were not allowed, because the evidence that the delays were caused by the strike was insufficient. Also, the court refused to allow damages for lost profits on contracts on which Hoffman did not bid because of the strike. The reason was that,

> even in a prime work period of a prime season with much work available, it cannot fairly be assumed that a volume of work which was not bid would have been both bid and received in such order as to keep the workload and facilities in reasonable balance for the whole season.

384 F.Supp. at 1254.

Hoffman argues that the rulings disallowing items of damages were erroneous. It cites authorities to the effect that uncertainty as to the precise amount of damages should be resolved against the wrongdoer, *e.g.*, *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-66 (1946), and that "a just and reasonable approximation" is all that is required, *e.g.*, *Sheet Metal Workers Local 223* v. *Atlas Sheet Metal Co.*, 384 F.2d 101, 109 (5th Cir. 1967). We do not question these general propositions, nor did the district court. Nevertheless, the fact of damages, as distinguished from the amount, must be proved. *See Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562-63 (1931). And the party complaining of error in findings of the trial court must demonstrate the error with something more than general assertions of the kind made here. A reviewing court will not make its own search of the record to determine whether such general assertions are supportable.

Although we cannot say that damages could never be recovered for lost profits on contracts not bid upon because of a strike, Hoffman has not persuaded us that the district court erred in not awarding such damages here. Its brief offers no guidance through the details of the evidence on damages and does not show with particularity why it was error for the district court to find a failure of proof that "the work which was not bid would have been both bid and received in such order as to keep the workload and facilities in reasonable balance for the whole season." We are not persuaded by Hoffman that this finding or the finding of insufficiency of the evidence as to the cause of delays was clearly erroneous.

The union, although criticizing the district court's calculation of damages, does so in the course of arguing that the amount should not be increased, and does not ask that the amount be decreased in the event judgment is entered for Hoffman. Even treating these criticisms as an argument that the damages should be reduced, we are not persuaded that the district court erred in its assessment of damages.

The judgment is reversed, and the case is remanded to the district court with directions to enter judgment in favor of plaintiff in the amount of $117,512.57. Each party shall bear its own costs on this appeal.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

March 31, 1980

Before

Hon. Philip W. Tone, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Hubert L. Will, Senior District Judge*

George E. Hoffman & Sons, Inc., a corporation of the State of Delaware,
Plaintiff-Appellant,
No. 78-2521 vs.
International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 627, a labor organization,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Springfield Division.
No. S 76-C-132
J. Waldo Ackerman, Judge.

Order on Rehearing

The opinion of the court issued February 6, 1980, is hereby modified as provided in this order.

Footnote 14 of the opinion is amended to read as follows:

[14] The union argues that our decision on the prior appeal established as the law of the case that "if Barker did not know of the truck sales until after the pre-job con-

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* The Honorable Hubert L. Will, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

ference and agreement and his objective was work preservation then no liability exists." It may be conceded that, regardless of whether Barker knew of the five truck sales, the union would not be liable if his object was solely work preservation. On the prior appeal, his knowledge of the truck sales was thought to relate to that issue. On review was a summary judgment that appeared to have been based on the reasoning that because Barker knew at the time of the pre-job agreement that Hoffman was going to sell at least one truck and because the pre-job agreement required that Hoffman trucks, not Hoffman drivers, work first, the strike demands impermissibly went beyond the scope of the pre-job agreement and focused on the subcontractors. This court, finding that these two subsidiary factual conclusions were disputed by the local and thus that summary judgment was not proper, reversed and remanded, saying,

> If in fact Barker had no notice of the sales of the trucks until after the agreement was reached, it is likely that this fact coupled with the wording of the agreement and the rationale of Local 627's "work preservation" defense would support a finding that the strike was motivated by a desire to assert pressure on Hoffman & Sons and had as its object compelling conformity to the prejob arrangement as understood by the local.

The assumption underlying this statement was that the sole object of the strike was to enforce the pre-job agreement by compelling Hoffman to employ the Local 627 drivers that would have driven the five trucks. However, since the remand was for trial on all questions of fact, Hoffman was free to advance the theory that the foregoing assumption was incorrect and that even if both fact findings of the original trial court were erroneous, the strike was still impermissible because the union's objectives extended

beyond the jobs that went with the five trucks. The evidence showed this was so, as we explain in the text, *infra.* Nothing in our prior decision indicates that Local 627 would not be liable if the objective of the strike was not solely work preservation but in part displacement of subcontractors' drivers who were doing work that Hoffman was never in a position to do.

Part IV. of the opinion, pp. 20-22, is amended to read as follows:

IV.

Although there is no judgment for damages before us, the posture of the case makes it necessary to determine the issue of damages. In a separate trial on that issue held before the first appeal, the district court awarded Hoffman $117,512.57. *George E. Hoffman & Sons, Inc.* v. *Teamsters Local 627,* 384 F. Supp. 1252 (S.D. Ill. 1974). Hoffman argues that if we hold the union liable we should declare that award inadequate. Inasmuch as neither Hoffman nor the union sought a new trial on damages in their briefs or oral arguments in this court,[12] we decide the damages issue on the record before us.

The damages allowed were in four categories: certain expenses incurred because of the strike; lost profits on sales of materials; lost profits that would have been earned if the strike had not prevented Hoffman from performing contracts it had entered into; and lost profits on an amount of work not bid that Hoffman would have done absent the strike.

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[12] In its petition for rehearing, the union states that upon remand from this court's unpublished order in 1976 the district court denied the union's request for a new trial on damages. The union did not seek a review of this ruling on appeal, however.

The court disallowed damages allegedly caused by delays on certain projects, because the evidence that the delays were caused by the strike was insufficient. Also, the court refused to allow most of the damages Hoffman claimed for lost profits on contracts on which it did not bid because of the strike. The reason was that,

> even in a prime work period of a prime season with much work available, it cannot fairly be assumed that a volume of work which was not bid would have been both bid and received in such order as to keep the workload and facilities in reasonable balance for the whole season.

384 F.Supp. at 1254.

Hoffman argues that all the damages it claimed should have been allowed. It cites authorities to the effect that uncertainty as to the precise amount of damages should be resolved against the wrongdoer, *e.g.*, *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-66 (1946), and that "a just and reasonable approximation" is all that is required, *e.g.*, *Sheet Metal Workers Local 223* v. *Atlas Sheet Metal Co.*, 384 F.2d 101, 109 (5th Cir. 1967). We do not question these general propositions, nor did the district court. Nevertheless, the fact of damages, as distinguished from the amount, must be proved. *See, Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562-63 (1931). And the party complaining of error in findings of the trial court must demonstrate the error with something more than general assertions of the kind made here. A reviewing court will not make its own search of the record to determine whether such general assertions are supportable. Hoffman has not persuaded us that the district court erred in finding a failure of proof that the strike caused the delays complained of. Nor do we find

error in the court's disallowance of a substantial part of the damages claimed for work not bid.

The court did allow $41,860 of lost profits on unbid work, based on a finding that if the strike had not occurred Hoffman would have been able to do at least $200,000 of additional work that it did not bid. The union attacks this portion of the award as inconsistent with the district court's disallowance of the damages for all the unbid work Hoffman contended it could have done absent the strike. There is no inconsistency. That the court could not find on the evidence that Hoffman would have worked at the same capacity all season as it did before and after the strike does not preclude a finding that at least some of the unused capacity would have been used.

The finding that $200,000 of unbid work would have been done absent the strike is not clearly erroneous. Hoffman offered evidence of the large volume of work available, exceptionally good weather, and it averages daily gross receipts for days it actually worked in the summer of 1971. Multiplying that figure by the number of work days lost because of the strike yielded approximately $1,600,000 in total work lost because of the strike. Reducing this figure by approximately $200,000 of lost work on contracts actually received by Hoffman leaves $1,400,000 attributed to work not bid because of the strike. The district court did not allow lost profits on that amount, as we have noted. It could not find on the evidence that any particular contract on which Hoffman might have bid would have been awarded, or that it would have been possible to coordinate all the jobs so that Hoffman could have worked at the same level during the strike period as it did before and after. Nevertheless, Hoffman's evidence was sufficient to support the court's finding that at least $200,000 of the unbid work would have been done in the absence of the strike. When the fact of damage is shown, the plaintiff's

inability to prove damages with absolute precision does not preclude an award. Accordingly, we affirm the district court's award of $117,512.57 in damages, which includes the disputed $41,860 on unbid work.

The opinion, as published in the Federal Reporter, Second Series, shall bear the notation "As Modified on Rehearing."

The petition of appellee for rehearing is DENIED.

APPENDIX B

In The United States District Court
Southern District of Illinois—Southern Division

George E. Hoffman & Sons, Inc., a corporation of the State of Delaware, Plaintiff,	
v.	S-Civ-76-132
International Brotherhood of Teamsters, Chauffeurs, Warehousemen And Helpers of America, Local No. 627, a labor organization. Defendant.	

ORDER

(Filed October 20, 1978)

This action was commenced in June, 1971, when plaintiff, George E. Hoffman & Sons, Inc., (hereinafter Hoffman, Inc.) filed suit against defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 627 (hereinafter Local 627), pursuant to § 303 of the Labor Management Relations Act of 1947, as amended. Judge Morgan's entry of summary judgment for plaintiff on the liability issue (published at 352 F.Supp. 677) was reversed by the Court of Appeals for the Seventh Circuit in an unpublished, *per curiam* order dated February 19, 1976, and the case was remanded for trial on all questions of fact. Judge Morgan had awarded plaintiff damages of $117,512.57 in a judgment entered December 6, 1974 (published at 384 F.Supp. 1252). This portion of his order was appealed to the Seventh Circuit but was not addressed by that Court in its order of February 19.

Following remand to the District Court, and transfer to this division, I ruled on December 13, 1977, that such remand would

be limited to the question of defendants' liability for damages. Evidence was heard on this question in a bench trial on February 21-22, 1978. Following submission of post-trial briefs, the case was taken under advisement to enable me to review the oral and written arguments of counsel in light of the evidence presented at trial.

This case presents some difficult factual and legal questions in labor law, a field of great importance to industrial relations in our country. All of the parties here agree that Local 627, on June 17, 1971, called a strike which resulted in picket lines being established at Hoffman, Inc.'s Peoria, Illinois, facility and its Princeville, Illinois, paving project. The strike activity shut down the paving project and forced a halt to Hoffman, Inc. projects within the jurisdiction of Local 627. A factual outline of the events leading up to the strike is set forth in Judge Morgan's opinion as well as the Seventh Circuit's order and need not be repeated here.

Hoffman, Inc. contends that the strike violated several unfair labor practice provisions under 29 U.S.C. § 158. First, since an object of the defendant's conduct was allegedly to force the plaintiff to agree to an interpretation of restrictions on its subcontracting which violated § 8(e) of the National Labor Relations Act (hereinafter the Act), the defendant's strike to obtain such an interpretation violated § 8(b)(4)(A) of the Act. Second, since a further object of the defendant's strike was allegedly to force the plaintiff "to cease doing business" with certain of its subcontractors, the defendant has also violated § 8(b)(4)(B) of the Act. Finally, since an object of the defendant's strike was allegely to force the reassignment of all truck driver duties in connection with the Peoria County Project to its members rather than to the drivers represented by Local 15, the defendants also violated § 8(b)(4)(D) of the Act.

Local 627 asserts that the strike was motivated by plaintiff's failure to abide by a decision of the Joint Grievance Committee.

In striking to enforce the arbitration award, the union allegedly sought only to preserve the work which its members had traditionally done. This "work preservation" doctrine as enunciated in *National Woodwork Mfr.'s Assn.* v. *NLRB,* 386 U.S. 612 (1967), is activity not violative of § 8(e), § 8(b)(4)(A) or (B). Furthermore, the job recapture involved here is believed not to be within the reach of § 8(b)(4)(D). An additional objection to this later claim is that the prerequisite jurisdictional dispute is lacking as there are not two active competing claims to the work in question.

As a threshold matter I must decide the factual questions involving Local 627's motivation in calling the strike. Contrary to defendant's assertion, the Seventh Circuit opinion does not limit my inquiry to the single question of whether Barker, President and Business Representative of Local 627, had no notice of the sale of the trucks until after the agreement was reached. In order to reverse the summary judgment order the Seventh Circuit only needed to find a single material question of fact (see page 9 of their order) and they remanded for trial on *all* questions of fact. Under *Woodwork Manufacturers* the appropriate inquiry is whether, under all the surrounding circumstances, the Union's objective was preservation of work for employees or whether the strike was tactically calculated to satisfy union objectives elsewhere. *See generally, NLRB* v. *Pipefitters,* 429 U.S. 507 (1977).

From my consideration of the evidence and argument thereon, I have concluded that Barker had no notice of the sale of the trucks until after the pre-job conference and agreement. In view of the circumstances surrounding the pre-job conference it was reasonable to believe that Hoffman, Inc. would be using enough Local 627 drivers for 10 tandem trucks. The Articles of Construction Agreement compelled Hoffman, Inc. when working within the jurisdictional area of Local 627, to have that local refer applicants for any job opening. Hoffman, Inc. provided Local 627 with a list of drivers from which the

local would refer drivers by seniority to Hoffman as they were needed. While there is some dispute over whether Hoffman, Inc. would use a certain number of drivers from Local 627 or use their *10* trucks prior to hiring any subcontractors, the fact is inescapable that preserving the number of positions was important to Local 627. The consequence of selling the *5* trucks without either replacing the trucks or making provisions to employ the number of drivers which would have been required to operate the 5 trucks, was that Hoffman, Inc. violated a material part of the pre-job agreement. In addition, since the total amount of work to be completed was obviously not affected by the truck sales, the work had to be farmed out to subcontractors. The subcontractors were thus doing some work which Local 627 employees at Hoffman, Inc. were entitled to and had done previously.

I am also convinced that the objective of defendant's actions following his discovery of the truck sales was to preserve the jobs of the Hoffman, Inc. drivers displaced by the apparent breach of the pre-job agreement. Further analysis was necessary to assure that after beginning with this objective the defendant's reactions did not become overbroad so as to encompass other, impermissible, objectives. After looking at the evidence adduced as to, *inter alia,* the March 18 telephone call and telegram, the grievances filed against plaintiff and the Joint Committee ruling thereon, the Barker letter of July 28, and the totality of the circumstances during the time leading up to and following the strike, I cannot rule that defendant's actions were inconsistent with the work preservation objective. All of the facts and circumstances lead me to believe that the strike was motivated by a desire to assert pressure on Hoffman, Inc. to compel conformity to the pre-job arrangement as understood by the Local and enforcing the arbitration decision of the Joint Committee. Given these motivations and the actions taken pursuant to the motivations, each of the plaintiff's theories can be analyzed.

The § 8(b)(4)(A) and (B) theories must fall consistent with my perception that defendants were attempting to preserve jobs which rightfully belonged to the local's members and were traditionally held by them. The strike was of a primary nature and was not aimed at coercing Hoffman, Inc. to take any course of action vis-a-vis its subcontractors. Under *Woodwork Manufacturers,* §§ 8(b)(4)(A), 8(b)(4)(B) and 8(e) to not reach employees' activity to pressure the employer to preserve for themselves work traditionally done by them. *Id.* at 635. That the strike has an impact on neutral employers does not transform the strike into secondary activity.

Neither can I find that plaintiff has proven a violation of § 8(b)(4)(D). The thrust of that section is to prevent Local 627 from picketing to compel their employer to reassign to them work originally assigned to Local 15. A reasonable view of the facts in this case is that Local 627 was picketing to prevent their employer from continuing to assign the Local 15 work which had originally been assigned to Local 627. No NLRB decision under § 10K had been made as to any jurisdictional dispute and that is notable only to the extent Local 627 was not violating any determination of that Board. The other factors mentioned by defendant, including the provisions within the Articles of Construction Agreement and the failure of Local 15 to protest the defendant's action, are not dispositive of this issue but further convince me that plaintiff has failed to meet its burden in proving a claim under this section.

In summary, plaintiff has been unable to sustain its burden as to any of the three statutory violations set forth in its civil complaint. I must therefore find for the defendant and against the plaintiff.

Enter this 20th day of October, 1978.

/s/ J. WALDO ACKERMAN
United States District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued September 24, 1975
February 19, 1976

Before

Hon. John Paul Stevens, Circuit Justice[1]
Hon. Luther M. Swygert, Circuit Judge
Hon. Robert L. Kunzig, Judge[2]

George E. Hoffman & Sons, Inc., a corporation of the State of Delaware,
Plaintiff-Appellee, Cross-Appellant,
Nos. 75-1145, 75-1146 vs.
International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 627, Labor Organization,
Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Northern Division.
No. CV P 3267
Robert D. Morgan, Judge.

ORDER

The question for determination on this appeal is whether a strike initiated by Local 627 of the International Brotherhood of

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[1] Mr. Justice John Paul Stevens participated initially as Circuit Judge and on and after December 19, 1975 as Circuit Justice.

[2] The Honorable Robert L. Kunzig, United States Court of Claims Judge, is sitting by designation.

Teamsters, Chauffeurs, Warehousemen and Helpers of America against George E. Hoffman & Sons, Inc. was an illegal secondary boycott and thus rendered the union liable for damages to the company under section 303 of the Labor Management Relations Act of 1947 (LMRA).[3] The district court granted the company's motion for summary judgment on the question of liability.

This case arose upon the filing of a complaint by Hoffman & Sons against Local 627 charging it with unfair labor practices as defined by section 8(b)(4) of the National Labor Relations Act (NLRA).[4] Local 627 had called a strike on June 17, 1971 which resulted in picket lines being established at Hoffman's Peoria, Illinois facility and its Princeville, Illinois paving project. The strike activity shut down the paving project and forced a halt to all other Hoffman projects within the jurisdiction of the local.

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[3] Section 303 provides, in pertinent part:

> (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . without respect to the amount in controversy, . . . and shall recover the damages by him sustained and the cost of the suit.

[4] Subsection 8(b)(4) provides, in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * *
>
> (ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, when in either case an object thereof is—
>
> (A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by subsection 8(e) of this section;

Hoffman's claim for damages is dependent on the validity of its contention that the local's purpose in calling the strike was to force the company to cease doing business with subcontractors who did not use Local 627 drivers. A strike so motivated—directed at the prime contractor in order to exert pressure on it to stop dealing with its subcontractors—would constitute an illegal secondary boycott and entitled Hoffman to the recovery of damages, including lost profits, under section 303 of the LRMA. The critical issue is, therefore, the determination of Local 627's motivation in calling the strike. If the object of the local's activities was to force Hoffman to reform its contracts with its subcontractors so that work on the Princeville project would be reassigned to Local 627 drivers, the strike would not constitute protected activity under section 8(b)(4). If, however, as the local asserts, the strike was directed at Hoffman in an effort by the union to preserve for its members those jobs they had traditionally performed,[5] its actions had the characteristics of primary activity and are thus protected from a suit for damages under section 303 which applies only when an employer is injured due to a violation of section 8(b)(4)'s prohibition against secondary activity.

> (B) forcing or requiring any person to cease . . . doing business with any other person, . . .; *Provided,* that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
>
> * * * *
>
> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization, . . . unless such employer is failing to conform to an order or certification by the Board determining the bargaining representative for employees performing that work.

[5] In *National Woodwork Manufacturers Association* v. *NLRB,* 386 U.S. 612 (1967), the Supreme Court recognized that a strike is not a violation of section 8(e) if its object is to preserve work traditionally performed by the employee unit which is striking.

Both parties to this action presented the district court with pleadings and briefs, depositions, affidavits, and written exhibits including the Report of Proceedings before the National Labor Relations Board in a matter involving Local 627 and the Associated General Contractors of Local 627 and the Associated General Contractors of Illinois.[6]

The central issue in any appeal from the issuance of a summary judgment is whether there was any genuine issue as to a question of material fact.[7] If no such question exists, the movant is entitled to judgment on the law applicable to the established facts. 6 J. Moore, Federal Practice ¶56.04[2] (2d ed. 1966) p. 2066. The moving party has the burden of establishing the absence of any genuine issue of material fact. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970). In evaluating a motion for summary judgment a court is to read it in the light most

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[6] Docket No. 38-CD-62. This proceeding is related to the matter now before us for consideration. The local and the association were parties to an agreement which established, among other things, a joint committee for the processing of grievances. The committee, on two separate occasions considered the local's complaints against Hoffman. The committee awarded the Local 627 drivers compensation for those Local 627 drivers who had not been called back to work by Hoffman and to those drivers on the union's referral list for all the hours worked by non-Local 627 drivers. The union claims that Hoffman's refusal to comply with the terms of this award was the cause of the strike called against the company.

[7] Fed.R.Civ.P. 56(c) reads in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

favorable to the opposing party. *Adickes* v. *S. H. Kress & Co., supra,* pp. 158-59; *United States* v. *Diebold, Inc.,* 369 U.S. 654, 655 (1962); *International Assoc. of M. & A. W., Dist. No. 8* v. *J. L. Clark Co.,* 471 F.2d 694 (7th Cir. 1972); 6 J. Moore, Federal Practice ¶56.15[3] (2d ed. 1966). Mr. Justice Jackson in *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620 (1944), stated, "a summary disposition . . . should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party." Thus, in considering a motion for summary judgment a court should proceed with caution to ensure that any question of fact be allowed to go to trial. *Smoot* v. *Chicago, R. I. & P. R. Co.,* 378 F.2d 879 (10th cir. 1967). An analysis of the district court's action in the present case in light of the above principles clearly indicates that summary judgment was improperly granted. The record before us contains, in addition to undisputed statements of fact, certain testimony, the credibility of which is in dispute. As the following condensation of the record on appeal indicates, the purpose of the object of the strike was not a matter which was capable for determination at the summary judgment stage.[4]

During the relevant time Local 627 and Hoffman & Sons were parties to a collective bargaining agreement effective for a period of three years which defined the territorial jurisdiction of Local 627 seniority lists and to use eligible Local 627 drivers on its trucks. In the late summer of 1970 a contract was awarded to Hoffman & Sons by the State of Illinois to widen and resurface some sixteen miles of Illinois Routes 90 and 91 near Princeville in Peoria County. Subsequently Hoffman entered into oral agreements with various subcontractors to haul a portion of the

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[4] Unless it is indicated otherwise, the facts which are stated herein are undisputed.

materials needed for the job.[9] With one exception, the hauling to be performed under these subcontracting agreements was to take place within the territorial jurisdiction of Local 627 under the collective bargaining agreement.

Some time in mid-February of 1971 John Hoffman, Hoffman & Son's executive vice-president, and J. T. Hackler, Hoffman's general superintendent, met with Robert L. Barker, president and business representative of Local 627. During this meeting the parties discussed the seniority list as well as other matters which are now in dispute. It appears that Barker was informed at that time that the company was finding it "less and less feasible" to continue to use the tandem-type dump trucks which were driven by Local 627 members. Barker's testimony in the NLRB hearing was that at this mid-February meeting Jack Hoffman mentioned the invention of a new type of tractor-trailer truck which would be better for this type of project and indicated that it sounded "like they were contemplating in the future going to this type of equipment.

On March 3, 1971 Barker, Hoffman, and Hackler again met for a prejob conference regarding the Princeville project. Although there is some dispute as to the interpretation of the conversation, it appears that Barker "cleared" Hoffman's use of the three subcontractors at that time and that Hoffman entered into a "work first" agreement with Barker which requird that all Hoffman's trucks work before any of the subcontractors were used.[10]

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[9] Long Rock Co. to haul "hot mix" for asphalt; Walter Lines to haul "hot mix," sand, and fly ash; and Winzeler Trucking to haul stone.

[10] Barker's understanding of this agreement was that all of the Hoffman drivers would work first.

On March 18, 1971 Barker telephoned Hackler. He claimed to have just learned of the sale of five tandum dump trucks by Hoffman which took place between February 13, 1971 and March 1, 1971.[11] Barker also testified that he informed Hackler during the call that he was "cancelling" the prejob agreement. A telegram followed that same day:

> I am now informing your company that you are not to use any drivers that are not members of Local 627 to do work in the jurisdiction of Local 627. Any drivers that are members of Local 627 must be cleared by myself. This is in accordance with the agreement between your company and teamsters Local 627.
>
> Robert L. Barker
> President Teamsters Local 627

Barker testified that, in addition, he demanded that he be given clearance as to the assignment of all Local 627 drivers so as to ensure that Hoffman drivers with seniority received priority over all other Local 627 drivers.[12]

Barker telephoned Hackler on May 14, 1971 to ask him whether he had any intention to act on the demands contained in the telegram sent on March 17, 1971. Hackler responded in the negative. Hackler claimed he also told Barker that the work was under way and that there would be no change in the subcontracting agreement. On May 20 Barker filed two grievances under the joint committee procedure sanctioned by its agree-

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[11] If Barker had such knowledge at the time of the prejob conference, his interpretation of the agreement that all Hoffman trucks would "work first," as actually referring to *drivers* being given preference, would, of course, be suspect. If the trucks were sold it would be impossible for all the Hoffman drivers to work before the subcontractors were used.

[12] Barker affidavit, ¶ 11.

ment with the Associated General Contractors of Illinois. One grievance referred to the fact that two of the five trucks sold were still in Hoffman's name and requested that the most senior Hoffman drivers currently laid off and available be used on these trucks; the other alleged that George Hoffman & Sons had trucks working in the Local 627 jurisdiction not driven by Local 627 members and demanded that Local 627 people be compensated for all hours worked by these outside drivers.

Both grievances were heard before the joint committee on June 10, 1971. The first proceeding deadlocked; but the committee found for the union in the second and granted the requested relief effective from March 18, 1971. The committee found Barker had a right to cancel the prejob agreement since he had not been notified of the sale of the trucks. The committee awarded compensation to Local 627 drivers who had not been called back to work by Hoffman & Sons and to eligible drivers on the Local 627 referral list for all hours worked by a sister-union's drivers.

A refusal by Hoffman & Sons to comply with the award by the committee resulted in a strike which shut down Hoffman's paving project on June 17, 1971. The strike continued until August 6, 1971.

In defense to the suit by Hoffman, Local 627 asserted that the strike was a justified reaction to both Hoffman's refusal to abide by the committee's findings and its noncompliance with Local 627's interpretation of the prejob conference agreement. Local 627 claims that the prejob agreement can only be reasonably interpreted as guaranteeing that Hoffman drivers work first and that Hoffman is required to see that this is done even after its five trucks were sold.

If one accepts Local 627's interpretation, the strike must be perceived as an attempt to preserve jobs which rightfully belonged to the local's members which were traditionally held by them. In other words, the strike was of a primary nature and

was not aimed at coercing Hoffman to take any course of action vis-a-vis its subcontractors.

In order to make this determination there must be a resolution of the conflict presented by Barker's assertion that he had no notice of the sales of the trucks at the time of the prejob conference and Hoffman's assertion that there was such notice and, therefore, that the prejob clearance agreement in regard to the use of subcontractors was in no way conditioned upon Hoffman's utilization of all its Local 627 drivers. Under the Hoffman interpretation, if all the trucks owned by the company—five of which were sold—were employed, the subcontractors services could be used. If in fact Barker had no notice of the sales of the trucks until after the agreement was reached, it is likely that this fact coupled with the wording of the agreement and the rationale of Local 627's "work preservation" defense would support a finding that the strike was motivated by a desire to assert pressure on Hoffman & Sons and had as its object compelling conformity to the prejob arrangement as understood by the local.

Resolutions of conflicts in testimony involve a decision as to credibility. Such issues are ones traditionally reserved for a trier of fact which a jury should consider and therefore inappropriate as a part of a summary judgment. *Sartor* v. *Arkansas Natural Gas Co., supra.* Summary judgment should not be granted unless there is no real question regarding the credibility of evidence. Testimony at trial affords the trier of fact an opportunity for the observation of demeanor. Cross-examination may expose flaws or inconsistencies in one party's version of the events in question. The district court here improperly found Hoffman's version of this critical interpretation question more credible than that of Local 627. This is not the court's function in summary judgment matters. In addition, we note that cases which involve questions of intent, purpose, or motive are "particularly inappropriate" for summary judgment. *Conrad* v. *Delta Air Lines, Inc.*, 494 F.2d 914 (7th Cir. 1974). All in-

ferences on the determination of a motion for summary judgment should be drawn in favor of Local 627. The burden was on Hoffman to establish that it was entitled to judgment as a matter of law and it has not met this burden.

Although there are other questions of material fact which appellant claims to exist, we need not reach them. The existence of a single critical question of material fact requires reversal.

The decision of the district court is reversed and the case is remanded for trial on all questions of fact under the provisions of Circuit Rule 23.

In The United States District Court
Southern District of Illinois
Northern Division

Geo. E. Hoffman & Sons, Inc.
a corporation of the State of
Delaware,

Plaintiff,

v.

International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America, Joint Council No. 65, a labor orgranization; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 627, a labor organization; and Robert L. Barker, their business representative and agent,

Defendants.

Civil Action
No. P-3267

DECISION AND ORDER

(Filed January 10, 1973)

This cause arose upon the complaint of George E. Hoffman & Sons, Inc., hereinafter referred to as Hoffman, against International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Joint Council No. 65, a labor organization, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 627, a labor organization, hereinafter Local 627, and Robert L. Barker, as business representative of each of said

labor organizations, for damages under the provisions of Section 303 of the Labor Management Relations Act of 1947. 29 U.S.C. 187. In general, the complaint, as subsequently amended, alleges that defendants were guilty of unfair labor practices as defined in Section 8(b)(4)of the Act. 29 U.S.C. 158 (b)(4)(i) and (ii), (A),(B),(D).

This cause is now before the court upon plaintiff's motion for summary judgment upon the question of liability against the defendant, Local 627.

The court has before it the pleadings, extensive depositions of the respective parties, the parties' stipulation of undisputed facts, the collective bargaining agreement in force between the parties, and other uncontested written exhibits, including the Official Report of Proceedings before the National Labor Relations Board in the Matter of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 627 and Local #15, and Associated General Contractors of Illinois, Docket No. 38-CD-62, and certain affidavits presented by the parties. The Court concludes that there exists no genuine issue as to any material fact for trial on the question of liability, and that summary judgment must therefore be entered as prayed.

This cause of action was precipitated by a strike by Local 627 against Hoffman, which commenced June 17, 1971 and continued until August 6, 1971. Hoffman's theory of complaint is that the strike was secondary activity, not primary union activity, and therefore an unfair labor practice under the provisions of Section 8(b)(4) of the Act.

Section 8(b)(4) has been construed by the Supreme Court as a proscription against secondary, or boycott-type, activity. *Woodwork Manufacturers* v. *N.L.R.B.*, 386 U.S. 412 (1967). That case contested the validity of a "will not handle" clause of an agreement between a carpenters union and the building construction industry. In the geographic area involved, traditional-

ly and by agreement, blank doors were purchased for all building projects and fabricated and fitted on the job site by carpenter employees of the contractor. When a contractor purchased prefabricated doors, i.e., prefitted with locks, etc., for a construction project, the union forbade its members to hang such doors, resulting in their rejection by the contractor and their replacement with blank doors. That conduct was challenged as an unfair labor practice under subsections 8(b)(4) and 8(e).

The Court held that the challenged conduct had as its object the preservation of work traditionally performed by contractors' employees in the geographic area involved and, thus, was primary activity, and not a violation of the Act.

Pertinent—the Court said that Section 8(b)(4) proscribes boycott union activities against a neutral employer when, in fact, the activity is carried on for its effect elsewhere. *Ibid,* at 632.

The Court further said:

> "The prohibition of subsection (d) against coercion to enforce an employer to assign certain work to one of two unions contesting for it protects the employer trapped between the two claims. The central theme prevading these provisions of protection for the neutral employer confirms the assurances of those sponsoring the section that in subsection (A) Congress likewise meant to protect the employer only from union pressures designed to involve him in disputes not his own." *Ibid,* at 625-626.

At page 645, the Court said:

> "The touchstone [whether union activity is primary, and legal, or secondary, and an unfair labor practice] is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees."

The legality of the activity of which complaint is here made must be measured by the guidelines established by *Woodwork Manufacturers.*

Relevant, uncontested, evidentiary facts are found as follows, in narrative form, as a preface to specific findings of ultimate fact, about which there is likewise no genuine issue.

Hoffman, a Delaware corporation, is engaged in the business of contracting highway paving projects, operating from its principal office in Peoria, Illinois. Local 627 is a labor organization, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, operating in the jurisdictional area of Peoria County, Illinois. At all material times, the parties Hoffman and Local 627 were bound by a collective bargaining agreement, captioned "Articles of Construction Agreement," negotiated prior to April 1, 1970, by and between Associated General Contractors of Illinois and the Illinois Conference of Teamsters (herein Agreement).

In the late summer of 1970, Hoffman was the successful bidder upon a contract with the State of Illinois to widen and resurface some sixteen miles of Illinois Routes 90 and 91 near Princeville, in Peoria County.[1] In preparation for that project, Hoffman erected a portable plant on the property of Long Rock Company, near Princeville, to produce and supply the hot mix (asphalt) necessary for completion of the project.

In early 1971, Hoffman entered into oral agreements with Long Rock,[2] Walker Lines[3] and Winzeler[4] to perform certain of the hauling necessary for the project. Winzeler was engaged to haul stone from barges at Peoria and Chillicothe, both in Peoria County, to the plant site. Long Rock was engaged to haul blow

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[1] The project was bid as a joint venture between Hoffman and Seneca Petroleum Company. Only Hoffman participated in performance of the contract.

sand from outside Peoria County to the site and to participate with Walker in the hot mix haul from the plant to the project. Walker was engaged to haul sand from Chillicothe and fly ash from East Peoria, Illinois, to the plant site, and to participate with Long Rock in the hot mix haul. Each-Winzeler, Long Rock, and Walker-was a party to the Articles of Construction Agreement.

About mid-February, 1971, Hoffman representatives met with defendant Barker, as business representative of Local 627, at which time they discussed and agreed upon Hoffman's seniority list. Barker then had knowledge that Hoffman intended to sell at least one of its fleet of trucks. Between February 15, 1971 and March 1, 1971, Hoffman sold five of its fleet of tandem dump trucks to five individuals. After such sale, Hoffman still owned five tandem trucks and one tractor-trailer unit.

On March 3, 1971, a pre-job conference related to the paving project was held at the office of Local 627, between Hackler, General Superintendent of Hoffman, Barker, and representatives of Teamsters Local 15.[5] At that conference, Winzeler and Long Rock were cleared as subcontractors by Barker. Clearance for Walker was later given, following a conversation between Barker and an officer of Walker. It was further agreed by Hoffman that its trucks would "work first" before the subcontractors were used. Barker was then aware that both Long Rock and Walker employed both Local 15 and Local 627

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[2] Long Rock Co., Princeville, Illinois, a corporation engaged in the production and hauling of stone and general hauling.

[3] C. A. Walker Truck Lines, Inc., Chillicothe, Illinois, a corporation engaged in general hauling.

[4] Winzeler Trucking, Tremont, Illinois, engaged in general hauling.

[5] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of American, Local 15, Galesburg, Illinois.

drivers.[6] Thereafter, work began on the project, and there is no indication that Hoffman ever permitted the subcontractors to haul when its own trucks were not working.[7]

On March 18, 1971, Barker phoned Hackler, claiming that he had just learned that Hoffman had sold five of its trucks and that he, Barker, was cancelling the pre-job conference agreement. On the same day, Barker sent Hoffman a telegram, stating:

> "I am now informing your company that you are not to use any drivers that are not members of Local 627 to do work in the jurisdiction of Local 627. Any drivers that are members of Local 627 must be cleared by myself. This is in accordance with the agreement between your company and Teamsters Local 627."

Hoffman advised Winzeler, Long Rock, and Walker of the fact of the telegram and supplied each with a copy thereof.

About May 14, 1971, when Hoffman began producing and supplying hot mix to the project, Barker phoned Hackler regarding the content of his earlier telegram. He was told by Hackler that work on the project was underway and that there would be no change in the subcontracting arrangements already made. After the hot mix haul began, Long Rock used some of its Local 15 drivers to haul blow sand to the asphalt plant from sources outside Local 627's jurisdiction and to haul hot mix from the plant to the paving project. Walker also used some Local 15 drivers to haul sand to the plant and to haul hot mix for the paving project.

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[6] Both Hoffman and Winzeler employed only Local 627 drivers on the project.

[7] A part of Hoffman's equipment was employed on projects other than the Princeville paving project.

Barker filed two grievances against Hoffman on May 20, 1971. The first sought pay for Local 627 drivers equal to the pay received by two owner-operators working for Winzeler who earlier had purchased tandem trucks from Hoffman. The other alleged:

> "George Hoffman & Sons has trucks working in the Local 627 jurisdiction that do not belong to Local 627. I am demanding that Local 627 people be compensated for all hours worked by these outside drivers."

After filing such grievances, Barker advised Hackler that he was going to demand that Local 627 drivers be paid for all the time worked by Local 15 drivers on the project. Both grievances were heard by the joint committee provided under the Agreement on June 10, 1971. The first, related to the two owner-operators, was deadlocked. Upon the grievance concerning outside drivers, Barker took the position that he had a right to cancel the pre-job conference agreement because he had not been told that Hoffman had sold five of its tandem trucks. He requested that drivers who had not been recalled to work by Hoffman and drivers on the Local 627 referral list receive compensation for all hours worked by Local 15 drivers on the project. Hoffman's position, stated to the committee by Hackler, was that it had a right to rely upon the pre-job conference agreement and that Barker's telegram could not abrogate that agreement. Neither Barker nor Hackler mentioned the fact that only Long Rock and Walker had used the Local 15 drivers involved in the grievance.

By a 5 to 1 vote, the Committee concluded that "Claim of the union be upheld from March 18, 1971, the date the union sent the telegram." The dissenting member of the Committee stated to other members that the grievance should have been against Long Rock and Walker, not against Hoffman.

After the grievance decision, Hoffman ceased work on the project until June 16, 1971. In the interim, Barker and Hackler

discussed settlement of the "outside drivers" grievance, in which discussions Barker advised Hackler that he (Barker) would need the payroll records of Long Rock and Walker. At about the same time, Barker asked Walker about particular days and hours worked by Walker's Local 15 drivers in connection with the project.

On June 16, 1971, work was resumed on the project. On that date, Barker asked Hackler if Hoffman intended to comply with the grievance decision against it by paying back pay. Hackler said, "No." On June 17, 1971, picket lines were established by Local 627 at Hoffman's Peoria facility and at the Princeville paving project, and Hoffman's Local 627 employees commenced to strike. The paving project and all other Hoffman projects then in progress within the jurisdictional area of Local 627 were shut down.

The strike continued until August 6, 1971, when the picket lines were removed from Hoffman's Peoria facility and the project site. Hoffman advised its subcontractors of its intention to resume work on the project, leaving to each the decision as to what, if any, adjustment of its employee relationships should be made.

When work was resumed on the project, Walker Lines elected to resume its part of the hauling, using only Local 627 drivers. Long Rock elected to resume hauling blow sand only, and to not participate further in the hot mix haul. Winzeler resumed its hauling in the same manner as before the strike. Hoffman engaged another subcontractor to participate with Walker in the hot mix haul. In the meantime, the original complaint in this cause was filed on June 30, 1971.

Ultimate Material Facts

1. The subcontracting of hauling work in conjunction with the highway construction project involved in this litigation was permitted by the Agreement to which both Hoffman and Local 627 were parties.

2. Hoffman, prior to the commencement of construction, had entered into valid subcontracts with Walker, Long Rock and Winzeler, which obligated each of those subcontractors to perform specified parts of the hauling of the materials necessary for Hoffman to perform its contract with the State of Illinois. Hoffman complied with the Agreement by obtaining clearance from Local 627 of its several subcontractors prior to commencement of the hauling work on the project.

3. Hoffman did not employ any drivers who were not members of Local 627 upon the construction project. It was not the employer of any Local 15 or "outside" drivers. The Local 15 drivers who participated in the material hauling related to the project were employed by either Long Rock or Walker.

4. The strike against Hoffman was commenced and carried on for the purpose of compelling a circumstance that only members of Local 627 would be employed in conjunction with the paving project.

5. Barker's demands to Hoffman were all-embracing. Neither correspondence nor his verbal demands on behalf of Local 627 drew any distinction between the hot mix haul within Peoria County and the transporting of materials to the asphalt plant, in part, from outside Peoria County.

6. Hoffman did not violate the Agreement in either its own employee relations in these circumstances or its conduct with respect to its subcontractors. If Local 627 had a legitimate complaint related to the use of Local 15 drivers on the project, its complaint was against Long Rock, or Walker, or both of them.

7. It was an object of the strike by Local 627 against Hoffman to compel Hoffman to reorder its contracts with Long Rock and Walker to compel an additional restriction in its said contracts that its subcontractors would employ only Local 627 drivers.

8. It was a further object of the said strike to compel Hoffman to cease doing business with Long Rock and Walker, or to

revise its contractual relationship with those companies in a manner compatible with the demands of Local 627 that only its members work on the project.

9. It was a further object of the said strike to compel the reassignment of all truck driving work in conjunction with the project to Local 627 drivers, to the exclusion of Local 15 drivers.

10. The contention of Local 627 that Hoffman, as prime contractor, was the employer of, or responsible for, the employees of its subcontractors is invalid. The primary complaint of Local 627 was against Long Rock, or Walker, or both of them. Hoffman was a neutral party caught between the primary parties to such dispute.

11. The strike against Hoffman was not addressed to the labor relations of Hoffman *vis-a-vis* its own employees. The strike was, therefore, secondary activity, conducted for its effect elsewhere; namely, upon Long Rock, or Walker, or both of them.

There is nothing in the record here to support the contention of Local 627 that the object of its strike was to reclaim work which was customarily allocable to its members. That contention is incompatible with the action of Local 627's having given prior approval of Long Rock and Walker when it then had knowledge that both of those companies employed Local 15 as well as Local 627 employees. Moreover, the Agreement contained the provision that a contractor might bring into the jurisdictional area of a local union up to twenty percent of its employees who were not affiliated with such local union.

Upon the basis of the undisputed facts, the court arrives at the following conclusions.

Conclusions Of Law

1. The court has jurisdiction of this cause under the provisions of Section 303 of the Act[8] and of the parties.

2. The practical effect of Local 627's strike against Hoffman was compulsion upon the latter, at least implicitly, to agree to cease doing business with Long Rock and Walker. Such an agreement would have been violative of the provisions of Section 8(e) of the Act.[9] Since its demands related to both on-site drivers and drivers transporting materials to the site, Local 627 is not entitled to the protection of the construction-site exception contained in that subsection.

3. The activity of Local 627 in provoking the strike against Hoffman with an object to compel Hoffman to reorder its subcontracts with Long Rock and Walker to include restrictions therein which would have been violative of Section 8(e) was an

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[8] Section 303 provides, in pertinent part:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

"(b) Whoever shall be injured in his business or property by reason or (sic) any violation of subsection (a) of this section may sue therefor in any district court of the United States *** without respect to the amount in controversy, *** and shall recover the damages by him sustained and the cost of the suit." 29 U.S.C. 187.

[9] Section 8(e) provides, in pertinent part:

"(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, *** to cease doing business with any other person, ***: *Provided,* that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure or other work: ***." 29 U.S.C. 158 (e).

unfair labor practice proscribed by Section 8(b)(4)(i) and (ii)(A) of the Act.[10]

4. The activity of Local 627 in provoking the strike against Hoffman with an object of compelling Hoffman to cease doing business with Long Rock and Walker was an unfair labor practice proscribed by Section 8(b)(4)(i) and (ii)(B) of the Act.[11] The "cease doing business" provision includes not only the complete cessation of business with another person, but, also, the compulsion to the modification of a valid contractual relationship in such manner as to restrict, or substantially change, or disrupt, the business relationship between the prime contractor and his subcontractor. *NLRB* v. *Carpenters Dist. Council of New Orleans & Vic.*, 407 F.2d 804, 806 (5 Cir., 1969).

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[10] Subsection 8(b)(4) provides, in pertinent part:

"8(b) It shall be an unfair labor practice for a labor organization or its agents —

* * *

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike ***; or (ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, when in either case an object thereof is —

"(A) forcing or requiring any employer *** to enter into any agreement which is prohibited by subsection 8(e) of this section;

"(B) forcing or requiring any person to cease *** doing business with any other person, ***: *Provided,* that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization *** rather than to employees in another labor organization, *** unless such employer is failing to conform to an order or certification by the Board determining the bargaining representative for employees performing that work: ***" 29 U.S.C. 158(b)(4)(i) and (ii)(A),(B),(D).

[11] See text quoted in Note 10.

5. The activity of Local 627 in provoking the strike against Hoffman with an object of compelling the reassignment of all truck driving work in conjunction with the Princeville project to Local 627 members, to the exclusion of Local 15 members, was an unfair labor practice proscribed by Section 8(b)(4)(i) and (ii)(D) of this Act.[12]

6. There is no viable factual basis for the averment by Local 627 that Hoffman was primarily liable for the compliance by its subcontractors with the Agreement. Local 627's interpretation of the joint committee ruling on June 10, 1971, as rendering Hoffman primarily liable for the compliance of Long Rock and Walker with the agreement, would have the legal effect of enforced termination of contractual relationships permitted by the agreement[13] and previously approved by Local 627.

7. Barker's attempt to abrogate the pre-job conference agreement was a legal nullity which cannot insulate Local 627 against the consequences of its violation of the provisions of Section 8(b)(4).

8. The undisputed facts render the work-recapture doctrine of the *Woodwork Manufacturers* case inapplicable to this decision.

9. The strike by Local 627 was secondary activity undertaken against a neutral employer for the purpose of enforcing modification of labor relationships between other employers and their employees.

10. There are no genuine issues of material fact to be decided.

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[12] See text quoted in Note 10.

[13] The Articles of Contruction Agreement expressly provided for the subcontracting of hauling, with the proviso that the prime contractor's equipment be first employed for that purpose.

11. Hoffman is entitled to a judgment against Local 627 as prayed in its motion for summary judgment.

IT IS ORDERED, accordingly, that judgment shall be entered immediately for plaintiff and against the defendant Local 627, adjudicating that said defendant is liable to Hoffman under the provisions of Title 29, United States Code, Section 187, for its provable damages, if any, resulting from the strike involved herein, together with its costs of suit.

It would appear that this order, while a final determination so far as this court is concerned, insofar as it goes, is interlocutory in character and not a final judgment in this case, because the questions of damages remains for determination, and the remaining interests or liabilities, if any, of the defendants other than Local 627 remain for adjudication. With respect to the provisions of Rule 4(b), F.R. Civ.P., there is no just reason for delay in entry of the judgment above directed as a final determination of this court on the points involved.

On the question of possible immediate appeal from said judgment, as provided under the circumstances set forth in Section 1292(b), Title 28, United States Code, two general observations should be made:

1. In a Pre-Trial Order approved by the then parties and entered by the court on March 10, 1972, the following recitation appears:

> "The issue of liability will be tried first, and each party shall have the right to appeal the Court's judgement concerning this issue pursuant to paragraph 1292(b) of Title 12 (sic) U.S.C., and consistent therewith. Thereafter, the issue of damages will be tried, if necessary."

Subsequently, a Second Amended Complaint was filed, with leave of court, substituting Teamsters Joint Council No. 65 for the Illinois Conference of Teamsters as a defendant. That complaint was answered and the subject motion for summary judg-

ment was filed. It would seem clear, however, that the spirit of that mutual commitment between plaintiff and Local 627, with this court's approval, should be carried out insofar as possible, subject, of course, to the approval of the United States Court of Appeals for the Seventh Circuit, as required for such appeal by Section 1292(b), Title 28, United States Code.

2. The Court of Appeals conceivably could disagree with conclusions of law leading to said judgment of liability herein and reverse the same. In that event, the ultimate termination of this litigation might be materially advanced because there would then be no occasion to try any issues of damages. Furthermore, should such disagreement eventuate, it would then seem quite presumptuous of this court to now assert that there is no substantial ground for difference of opinion on the proper application of the statutes here involved to the established facts of this case, even though this court might now be firmly of that opinion.

Accordingly, this statement is considered to be the statement in writing of the district judge referred to in said Section 1292(b), to permit application to the Court of Appeals for an immediate appeal from this order, without being a statement that this court considers its said decision in any sense to rest on insubstantial or uncertain grounds.

/s/ Robert D. Morgan
United States District Judge

Entered: January 10, 1973

In The United States District Court
Southern District Of Illinois
Northern Division

Geo. E. Hoffman & Sons, Inc., a corporation,
Plaintiff,

v.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 627, a labor organization.
Defendant.

Civil No. P-3267

DECISION AND ORDER ON DAMAGES

(Filed December 6, 1974)

This is a suit for damages under Section 303 of the Labor Management Relations Act of 1947, as amended (Title 29, United States Code, §187). On January 10, 1973, through a written decision and order (352 F. Supp. 677), this court decided that defendant, Local 627, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "Local 627"), if liable to plaintiff for its provable damages, if any, resulting from a strike which said defendant maintained against plaintiff from June 17, 1971 through August 6, 1971. By agreement, the issues of liability and damages had been separated for trial,[1] and the damage question has now been

[1] The parties agreed upon separation of the issues to provide opportunity for interlocutory appeal of the decision on liability. That decision here was certified for appeal under Rule 54(b), F.R.Civ.P., and §1292(b) of Title 28, United States Code, and the United States Court of Appeals for the Seventh Circuit granted Local 627 permission to appeal on February 7, 1973, in its case number Misc. 73-8206. That appeal was dismissed on May 24, 1973 in case number 73-1386, however, "for the reason that the application for leave to appeal * * * was not timely filed."

tried before the court, without a jury, on July 8, 1974 through July 16, 1974. Proposed findings of fact and conclusions of law have been filed by both parties.

The matter of damages is strongly contested, plaintiff claiming over $416,000 and defendant conceding only about $4,500 of specific out-of-pocket expenses clearly caused by the strike. The main contest is over the claimed speculative nature of plaintiff's asserted losses, it being clear that the strike actually did prevent accomplishment of much work by plaintiff on some 34 work days out of an eight-month construction season, which was generally about the busiest and most profitable season in the history of the industry in which plaintiff is engaged. The courts have acknowledged that precise calculation of damages is not possible in this situation, but have also recognized that it would be intolerable to pretend that substantial damages were not suffered, or to let the party responsible escape the obligation for reasonable indemnification for lost profit, simply because determination of exactly what would have happened but for the illegal strike cannot be positively ascertained. *See Abbott* v. *Plumbers, Local 142,* 429 F.2d 786 (5 Cir. 1970); *United Steelworkers* v. *CCI Corp.,* 395 F.2d 529 (10 Cir. 1968); *Operating Engineers, Local 653* v. *Bay City Erection Company,* 300 F.2d 270 (5 Cir. 1962); *Osborne Mining Company, Inc.* v. *United Mine Workers,* 279 F.2d 716 (6 Cir. 1960).

Having carefully considered the evidence adduced at the trial herein on the issue of damages, as well as the scholarly briefs and proposals submitted on behalf of the parties, the court is as fully advised as possible and does make the following:

Findings Of Fact

1. Plaintiff, Geo. E. Hoffman & Sons, Inc. (hereinafter sometimes referred to as "Hoffman"), is a bituminous paving contractor specializing in the patching, widening and resurfacing of highways, roads and streets in the Illinois counties of

Peoria, Woodford, Tazewell, Fulton, McDonough and Marshall.

2. 1971 was one of the best, if not the best, years in terms both of weather conditions and work availability for contractors performing the type of work engaged in by Hoffman in the areas where Hoffman normally operates. The strike period was an especially good period within the 1971 season for performing such work, as well as for obtaining it.

3. Within the 91-½ days during the 1971 construction season on which Hoffman did perform work, Hoffman produced 211,777 tons of asphalt for projects it had under contract. Despite the strike, Hoffman's total sales in 1971 were $5,514,089, which was the highest in its history to that time.

4. The strike of Local 627 caused failure of the Hoffman organization to accomplish revenue-producing work on 34 work days during the strike period, which but for the strike would have been highly productive days.

5. During the strike period and but for the strike, Hoffman would have made profit on over-the-counter sales of various materials of $21,448.15.

6. As a result of the strike, Hoffman incurred certain specific expenses, which it would not otherwise have sustained, for space and equipment rental and utility charges in the amount of $4,423.92.

7. Hoffman also incurred barge demurrage and barge pump rental charges of over $12,500 on barges of stone which were not unloaded until after the strike, but known reasonable and possible steps could have been taken to have said barges moved and unloaded during the strike, which would have saved at least $9,500 in getting said stone to the place where it was ultimately used. Accordingly, allowable damages on this item of delayed stone delivery are limited to $3,000.

8. After and because of the strike, Hoffman was required to perform certain preparatory work before construction work could be resumed on projects that were in process at the inception of the strike. The total labor cost necessary to accomplish such preparatory work was $2,476.43.

9. Hoffman also suffered substantial expense in extra charges for hauling "hot mix" after the strike on its project near Princeville, Illinois, due to the election of C. A. Walker Truck Lines, Inc. and Long Rock Co. not to resume this hauling for Hoffman after the strike because they feared Teamster grievances would be filed against them. The substitute trucker charged Hoffman more. Though there may be substance to the belief that the basic unfair labor practice herein of Local 627 was the impelling cause of this loss which Hoffman did bear, there is no showing of efforts by Hoffman to collect it from its subcontractors who apparently violated their prior agreements for the hauling. Apparently neither Walker nor Long Rock made any effort to perform its contract, and it is not clear that Hoffman even asked either of them to do so. Under the circumstances, the court does not find this extra hauling expense to be an element of Hoffman's damage against Local 627.

10. Hoffman's claim of extra labor costs because of strike delay on the Greater Peoria Airport project, which Hoffman had in 1971 as a joint venture with Seneca Petroleum Company, is simply too speculative in relation to the strike to assess as damages. There are too many other possible reasons for the delays involved, and also too many untried means of avoiding the delay, if that was a goal of Hoffman management. It simply cannot be determined that such extra costs as were incurred are elements of damage proximately caused by the strike.

11. The amount of liquidated damages Hoffman suffered on the airport contract, even reduced by its claim for the MATS' work, is not sufficiently shown to have been caused by the strike to make a finding that such costs are a proper element of damages here.

12. The expense of delay into 1973 in the operational status of Hoffman's new "hot storage silo system" (purchased in the fall of 1970), rather than being used for the last 34 days of the 1972 season, as allegedly anticipated, is too remote and speculative for a finding that it was caused by the strike. It has not been shown that the strike period itself, or some other possible times before or after the strike, could not have been utilized for erection of the system by available personnel to avoid the delay in use which was suffered.

13. Hoffman incurred legal fees and related expenses in the amount of $2,018.22, which were directly caused by the strike and efforts to end the same.

14. The Local 627 approach to computation of lost profit for the work days lost during the strike by determining a daily average profit over a six-year period is inappropriate under the circumstances here, which involve 34 almost consecutive prime work days in the middle of one extra-ordinarily good construction season.

15. The Hoffman approaches to computation of lost profit for the work days lost during the strike, except for the one approach involving actual contract work lost, are also inappropriate in these circumstances, because even in a prime work period of a prime season with much work available, it cannot fairly be assumed that a volume of work which was not bid would have been both bid and received in such order as to keep the workload and facilities in reasonable balance for the whole season.

16. There were nine specific jobs, which Hoffman had under contract before the inception of the strike or which were awarded following the onset of the strike, which contracts Hoffman quite certainly would have performed to completion but for the strike, and which contracts were in fact lost or necessarily contracted to others without profit. These contracts would have

represented definite additional contract revenue for Hoffman for the 1971 season of $202,034.65.

17. The so-called Farmington Road job, which was let after the strike was over but on which Hoffman did not bid, cannot be fairly considered as a job which Hoffman would definitely have received but for the strike.

18. No other specific work which Hoffman neither bid nor received can fairly be said to have been lost due to the strike; but with the extremely high volume of work available of the type Hoffman was capable of doing, it would be grossly unfair to pretend that Hoffman would not have been otherwise productively occupied at least some of the strike period. If it did not do the exact patching work it expected to do as subcontractor in the amount of some $400,000, it would have done at least half that much similar work for others, or at least $200,000 of additional contract revenue would have been received by Hoffman in 1971 but for the strike.

19. The gross profit which would have been earned on all such additional contract revenue, found in Findings 16 and 18, is 20.93% thereof, or $84,145.85, after taking proper account of the variable expenses which would have been increased by such additional contract revenue, and the fixed expenses which would not.

20. While it is almost a moral certainty that money damages suffered by plaintiff due to the strike herein were substantially greater, perhaps several times greater, there is no other measure thereof sufficiently accurate for application and no other proof herein of sufficient certainty to support a judgment. The total damage proved herein is $117,512.57, being the total of the sums found in the foregoing Findings numbered 5, 6, 7, 8, 13 and 19.

21. Either of the following conclusions of law which might more appropriately be considered a finding of fact, and all

statements of fact in the narrative at the outset hereof, preceding the specific findings set forth in numbered paragraphs.

Conclusions Of Law

1. Jurisdiction of this cause, the standing of Hoffman herein to sue, and the liability of Teamster Local 627 for provable damages, were each established in an earlier proceeding. (*Geo. E. Hoffman & Sons, Inc.* v. *Teamsters,* 352 F. Supp. 677 (S D.Ill. 1973).)

2. Hoffman has established by competent proof that it was damaged to the extent of $117,512.57 by the strike engaged in by Teamster Local 627, which strike constituted an intentional disruption of Hoffman's business on an illegal basis.

3. Any of the foregoing Findings of Fact and narrative statements which might more appropriately be considered to be conclusions of law.

Judgment Order

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment in the amount of $117,512.57 is entered in favor of plaintiff, Geo. E. Hoffman & Sons, Inc., and against defendant, Local 627, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Such judgment shall bear interest pursuant to Section 1961, Title 28, United States Code, and plaintiff's costs herein are likewise to be taxed against defendant.

/s/ Robert D. Morgan
United States District Judge

Entered: December 6, 1974

United States District Court
For The
Southern District Of Illinois
Northern Division

Geo. E. Hoffman & Sons, Inc., a corporation

vs.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 627, a labor Organization

Civil Action
File No. P-3267

JUDGMENT

(Filed December 6, 1974)

This action came on for trial on the damage question before the Court, Honorable Robert D. Morgan, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that judgment is entered in favor of Plaintiff, Geo. F. Hoffman & Sons, Inc., and against Defendant, Local 627, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America for the sum of $117,512.57. Said judgment shall bear interest pursuant to Section 1961, Title 28, United States Code, and Plaintiff's costs herein are to be taxed against Defendant.

Dated at Peoria, Illinois, this 6th day of December, 1974.

/s/ William J. Littell
Clerk of Court

APPENDIX C

29 U.S.C. 158:

(b) It shall be an unfair labor practice for a labor organization or its agents-

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any good, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is-

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing:

* * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

* * * * *

APPENDIX D

Supreme Court of the United States

No. A-1145

International Brotherhood Of Teamsters,
Chauffeurs, Warehousemen & Helpers Of
America, Local No. 627,
Petitioner,

v.

George E. Hoffman & Sons, Inc.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 29, 1980.

/s/ John Paul Stevens
Associate Justice of the
Supreme Court of the United States

Date this 25th
day of June, 1980.

Supreme Court, U. S.
FILED
SEP 22 1980
MICHAEL RODAK, JR., CLERK

No. 80-147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 627,

Petitioner,

v.

GEORGE E. HOFFMAN & SONS, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent does not agree that the questions presented are as stated by Petitioner. Rather, the real and only questions involved in the instant case are:

1. Whether, under the work preservation doctrine, a local union may lawfully strike a construction industry employer to preclude subcontracting certain off-site work to subcontractors who do not exclusively employ its members?

2. Whether, pursuant to the "clearly erroneous" standard set forth in F.R.C.P. Rule 52(a), a court of appeals may properly draw its own inferences and conclusions from the facts as established by the trial court and undisputed record evidence concerning the objects of a strike engaged in by a labor organization?

INDEX

	Page
Questions Presented	i
Opinions Below	1
Statement of the Case	2
Reasons for Denying the Writ	3
Conclusion	12

AUTHORITIES CITED

Cases:

	Page
American Boiler Manufacturers Association v. *N.L.R.B.*, 404 F.2d 547 (8th Cir. 1969)	6
Brown v. *United States*, 419 F.2d 337 (8th Cir. 1969)	10
Canada Dry Corp. v. *N.L.R.B.*, 427 F.2d 907 (6th Cir. 1970)	6
C.I.R. v. *Duberstein*, 363 U.S. 278 (1960)	10
Franks v. *National Dairy Products Corp.*, 414 F.2d 682 (5th Cir. 1969)	10
Griffith Company v. *N.L.R.B.*, 545 F.2d 1194 (9th Cir. 1976)	7
Hillard v. *Commissioner of Internal Revenue*, 281 F.2d 279, 282 (5th Cir. 1960)	10
Houston Insulation Contractors Association v. *N.L.R.B.*, 386 U.S. 664 (1967)	3, 7
Local Union 282, Teamsters (D. Fortunato), 197 NLRB 673 (1972)	7
Meat and Highway Drivers Local 710 v. *N.L.R.B.*, 335 F.2d 709 (D.C. Cir. 1964)	6
Moveable Partitions, Inc., 175 NLRB 915, 917 (1969)	5
N.L.R.B. v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 689 (1951)	11
N.L.R.B. v. *Enterprise Association of Pipefitters*, 429 U.S. 507 (1977)	8
N.L.R.B. v. *International Longshoremen's Association*, ____ U.S. ____, 48 L.W. 4765 (1980)	4, 5, 8

N.L.R.B. v. *Local Union No. 28, Sheetmetal Workers,* 380 F.2d 827 (2nd Cir. 1967) 7, 8

National Latex Products Co. v. *Sun Rubber Co.,* 274 F.2d 224, 247 (6th Cir. 1959) 10

National Maritime Union v. *Commerce Tankers Corporation,* 457 F.2d 1127 (2nd Cir. 1972) 5, 7

National Woodwork Manufacturers Association v. *N.L.R.B.,* 386 U.S. 612 (1967) 3, 4, 8, 9, 10

Orange Belt District Council of Painters No. 48 v. *N.L.R.B.,* 328 F.2d 534 (D.C. Cir. 1964) 8

Romero v. *Garcia & Diaz, Inc.,* 286 F.2d 347 (2nd Cir. 1961) cert. denied, 365 U.S. 869 (1961) 10

Shumaker v. *Grabowski Industries, Inc.,* 352 F.2d 837 (7th Cir. 1965) 10

United Mine Workers v. *N.L.R.B.,* 399 F.2d 977, 979-980 (D.C. Cir. 1968) 8

United States v. *United States Gypsum Company,* 333 U.S. 364 (1948) 10

Wigginton v. *Order of United Commercial Travellers,* 126 F.2d 659 (7th Cir. 1942) cert. denied, 317 U.S. 636 (1942) 10

Statutes:

Sec. 8(b)(4) of the Labor Management Relations Act of 1947 ..... 9, 10, 11

Miscellaneous:

Moore's *Federal Practice,* ¶ 52.04, n. 2 10

No. 80-147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 627,

Petitioner,

v.

GEORGE E. HOFFMAN & SONS, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet officially reported (Pet. App. A-1-24). Also as yet unreported is the Court's Order on Rehearing (Pet. App. A-25-30), wherein such opinion was modified and Petitioner's petition for a rehearing denied. An earlier decision of the Court of Appeals is unpublished, but noted at 530 F.2d 979 (Pet. App. A-36-45). The Order of the United States District Court for the Southern District of Illinois, after trial of this case on the issue of liability, is not officially reported, but can be found at 99 LRRM 3236 (Pet. App. A-31-35). Earlier Orders

of the District Court are reported at 352 F. Supp. 627 (Pet. App. A-46-60) on such issue, and at 384 F. Supp. 1252 (Pet. App. A-61-68) on the issue of damages.

STATEMENT OF THE CASE

The "summary of facts" outlined by Petitioner is in part inaccurate and fails to include the salient facts which caused the Court of Appeals to reverse the judgment of the trial court. For a complete portrayal of such facts as the Court of Appeals saw them—and as they really are—see Pet. App. A-1-12.

On page 3 of the Petition, Petitioner states that Respondent and two of its hauling subcontractors, Long Rock and C. A. Walker Truck Lines, were parties to the Articles of Construction Agreement. However, as stated by the Court of Appeals, Respondent became bound to such Agreement as a consequence of its membership in the Associated General Contractors of Illinois, which had negotiated such Agreement on behalf of its members. Long Rock and Walker Lines, who were not members of this association, subsequently became bound to such Agreement when they separately and independently adopted it as their own (Pet. App. A-3, 17). Therefore, Petitioner's factual contention that such Agreement established a single, multi-employer bargaining unit is in error. While Respondent was a member of one bargaining unit, multi-employer in scope because it consisted of Respondent and other employer members of the Associated General Contractors of Illinois, the drivers employed by Long Rock and Walker Lines comprised other, separate single employer bargaining units (Pet. App. A-18).

On page 6 of the Petition, Petitioner states that the Court of Appeals "discredited" Barker's testimony in that it found Petitioner sought to prohibit the use of any Local 15 drivers by Respondent's subcontractors. However, the Court of Appeals

did nothing of the kind since that Court specifically stated: "To the extent that the evidence is conflicting, we rely primarily on the testimony of Robert Barker. . . , since that is the only evidence referred to by [Petitioner] to support the district court's decision." (Pet. App. A-2 n. 3).

REASONS FOR DENYING THE WRIT

1.

The Court of Appeals, In Accord With This Court's Decisions, Properly Rejected Petitioner's Work Preservation Defense.

On pages 7-8 of the Petition, Petitioner appears to make two different arguments with respect to the work preservation doctrine's applicability to the instant case. First, Petitioner submits its strike directed against Respondent was simply an attempt to recapture work lost when Respondent sold five of its trucks. In contrast, Petitioner also contends it had the right to strike Respondent to "retain" construction hauling work for its "members" on Respondent's projects within Petitioner's "geographical territory" even when such work was performed by subcontractors, and not Respondent's employees.

Both theories advanced by Petitioner were properly rejected by the Court of Appeals in its well-reasoned decision (Pet. App. A-13-20). Nonetheless, Petitioner claims the failure of that Court to find merit in its work preservation defense conflicts with this Court's decisions. In this regard, Petitioner cites *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967), and its companion case, *Houston Insulation Contractors Association* v. *N.L.R.B.*, 386 U.S. 664 (1967), to support the proposition that ". . . a union may exert pressure on an employer to preserve work traditionally performed or fairly claimable by the *union's members*" (emphasis added) (Pet. p. 7). However, these cases permit

such pressure to be applied only where a union's object is preservation of *bargaining unit* work, and not where such actions are "... calculated to satisfy union objectives elsewhere." *National Woodwork, supra* at 644-645. As the Court of Appeals held, Petitioner's strike was not limited to just regaining the jobs bargaining unit employees might have performed if Respondent had not sold five of its trucks (Pet. App. A-13-15).

In an attempt to bolster its argument, Petitioner also refers to a recent decision of this Court, *N.L.R.B.* v. *International Longshoremen's Association,* ____ U.S. ____, 48 L.W. 4765 (1980). However, the issue in that case was not whether the union was seeking to gain work for bargaining unit members as opposed to its members generally, but rather whether the work involved in the dispute was, although modified by technological innovation, the traditional work of bargaining unit employees. *Id.* at 4770-4771. Furthermore, the Court therein again repeated that the work preservation defense is available only to preserve work for "bargaining unit employees." *Id.* at 4769.

On page 8 of the Petition, Petitioner asserts: "When [Petitioner] first grieved the issue and then struck, it was merely reasserting its claim to work historically performed by *its* members, i.e., the [Respondent's] hauling for projects within the [Petitioner's] geographical territory." The problem with this contention is simply that Respondent itself employed only members of Petitioner on Respondent's projects in Petitioner's territory. Therefore, by its own admission, the object of Petitioner's strike against Respondent was the hauling work performed by Respondent's subcontractors who did not exclusively employ Petitioner's members. In this regard, the Articles of Construction Agreement specifically permitted such subcontracting by Respondent (Pet. App. A-4).

Although the Respondent's subcontractors had adopted the Articles of Construction Agreement, they did so separately and independently and, therefore, were not part of the multi-

employer bargaining group represented by the Associated General Contractors of Illinois. Thus, the respective employees of such subcontractors were not in the same bargaining unit with those of Respondent. *E.g., National Maritime Union* v. *Commerce Tankers Corporation,* 457 F.2d 1127 (2nd Cir. 1972); *Moveable Partitions, Inc.,* 175 NLRB 915, 917 (1969).

Since Petitioner's strike against Respondent was intended to benefit its members generally, and not simply those within the bargaining unit in which Respondent's employees were included,[1] the Court of Appeals properly, in accord with this Court's prior decisions, found that Petitioner had unlawfully asserted "secondary," rather than "primary," pressure against Respondent. Petitioner cannot, and should not, be allowed to escape liability by submitting that it was ". . . merely reasserting its claim to work historically performed by its members" (Pet. p. 8), when the work had been claimed for its membership generally—not just for its members who were part of the bargaining unit which included Respondent's employees.

2.

No Conflict Exists Among The Courts Of Appeals With Respect To The Work Preservation Doctrine's Applicability To The Facts And Circumstances Presented In The Instant Case.

On pages 9-11 of the Petition, Petitioner urges the Court to find that a conflict exists among the courts of appeals as to what work is subject to being "fairly claimable" by a union under the work preservation doctrine. Besides citing this Court's recent decision in *Longshoremen, supra,* Petitioner also relies on

[1] Petitioner sought to force Respondent to utilize subcontractors employing its *members* exclusively. However, Petitioner never attempted to require that those subcontractors' employees be within the *same* bargaining unit as Respondent's employees.

Canada Dry Corp. v. *N.L.R.B.*, 427 F.2d 907 (6th Cir. 1970); *Meat and Highway Drivers Local 710* v. *N.L.R.B.*, 335 F.2d 709 (D.C. Cir. 1964) and *American Boiler Manufacturers Association* v. *N.L.R.B.*, 404 F.2d 547 (8th Cir. 1969). However, the problem with its analysis is simply that this case has never turned on whether the work sought by Petitioner was fairly claimable, but rather on whose behalf it was being claimed. In this regard, the Court of Appeals corectly stated Respondent's position when it said: "[Respondent] has conceded that if the strike was thus limited [to regain the work lost by the sale of five of its trucks,] it was permissible as work preservation (Pet. App. A-13-14).

Petitioner further argues that the Court of Appeals improperly relied on the quantity of the work sought by Petitioner's strike in rejecting its work preservation defense when "... it sought work traditionally performed by its members within its geographical territory" (Pet. p. 10-11). This contention is not true. The Court of Appeals specifically stated (Pet. App. A-16 n. 20):

> Even if we accept the [Petitioner's] argument, there is still the question of whether a union's actions may be secondary because of the quantity of the work claimed from the primary employer. We need not consider that issue here, however, since the record shows that the [Petitioner] was attempting not to pursuade [Respondent] to do all its material hauling but to have the subcontractors use [Petitioner's] members on the project within [its] jurisdiction. Nowhere is there any indication that Barker asked [Respondent] to buy or rent additional trucks sufficient for all the hauling work. Instead, his concern was with the subcontractors' use of [non-members of Petitioner] on[the subcontractors'] own trucks.

The Petitioner also claims the Court of Appeals' decision creates a conflict as to what is the "... applicable unit for which work preservation demands may be made" (Pet. p. 11).

Petitioner's view is that it was privileged to preserve and protect construction hauling work for its *members* anywhere within its "geographical territory" without regard to being restricted in such purpose to any particular bargaining unit (Pet. p. 12). However, this contention is clearly without merit since it is now well settled that agreements and conduct intended to preserve, protect, acquire or reclaim work for union members *generally* (i.e. outside the *immediate* bargaining unit) do not fall within the protection of the work preservation doctrine because they exceed the legitimate interests of bargaining unit employees vis-a-vis their *own* employer, and are therefore calculated to satisfy union objectives elsewhere. *E.g., Griffith Company* v. *N.L.R.B.*, 545 F.2d 1194 (9th Cir. 1976); *National Maritime Union* v. *Commerce Tankers Corporation,* 457 F.2d 1127 (2nd Cir. 1972); *Local Union 282, Teamsters* (D. Fortunato), 197 NLRB 673 (1972).

Despite the existence of this well-established principle, Petitioner asserts that the Court of Appeals' decision, instead of being in accord with precedent, "created a conflict." In support of its position, Petitioner cited *Houston Insulation Contractors Association, supra,* for the proposition that ". . . work preservation demands need not relate directly to employees in the bargaining unit where action in support of the demand occurs" (Pet. p. 11). However, in that case, this Court established only that employees in one bargaining unit may strike in support of the work preservation claims of employees in another bargaining unit employed by the *same* employer. The obvious difference between the situation presented in that case as opposed to the facts in the instant case is that the union in *Houston Insulation* was not seeking to affect the labor relations policies of other than the *immediate* employer.

N.L.R.B. v. *Local Union No. 28, Sheetmetal Workers,* 380 F.2d 827 (2nd Cir. 1967), was cited by Petitioner to support its position that there can be more than one bargaining unit

directly involved in a lawful work preservation strike. That finding in no way conflicts with the holding in the instant case since there was no attempt by the union in that case to affect the labor relations policies of any employers outside of the bargaining units directly involved. *Id.* at 831. The opposite was true in the instant case since Petitioner admittedly was seeking to have subcontractors of Respondent replace their respective employees with members of Petitioner.

Orange Belt District Council of Painters No. 48 v. *N.L.R.B.*, 328 F.2d 534 (D.C. Cir. 1964), another case cited by Petitioner, was decided three years before *National Woodwork.* Moreover, the Court of Appeals in that case did not make a distinction between "principle work unit" and "bargaining unit", as Petitioner claims, but, instead, equated the two terms.[2] Had *Orange Belt* been decided after *National Woodwork,* that court would likely have used the term "bargaining unit" since, at p. 538, it did find that claimed work preservation conduct would be unlawful if its objectives were to ". . . extend beyond the [contracting] employer and are aimed really at the union's difference with another employer" (brackets appear in court's decision, citations omitted).

Respondent submits that Petitioner has failed to establish that the decision of the Court of Appeals conflicts with prior decisions of this Court or any other court concerning rejection of Petitioner's work preservation defense. Moreover, the instant case involves a unique fact situation unlikely to arise again and, therefore, the decision in this case is unlikely to affect anyone other than the parties. Furthermore, the Court has recently decided *N.L.R.B.* v. *International Longshoremen's Association,* ____ U.S. ____, 48 L.W. 4765 (1980), as well as *N.L.R.B.* v. *Enterprise Association of Pipefitters,* 429 U.S. 507 (1977), both of which explore and explain further the work

[2] See *United Mine Workers* v. *N.L.R.B.*, 399 F.2d 977, 979-980 (D.C. Cir. 1968).

preservation doctrine. Finally, the present case does not offer any issues of law concerning this doctrine which have not already been reviewed and resolved by this Court.

3.

The Court Of Appeals Properly Drew Its Own Inferences And Conclusions Concerning The Objects Of Petitioner's Strike Against Respondent.

As seen by Petitioner, the determination by the trial court that Barker was unaware at the time of the pre-job conference that Respondent had sold five trucks ends further inquiry regarding the object or objects of its strike against Respondent. However, this Court said in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612, 644 (1967):

> The determination whether [a disputed clause] and its enforcement violated 8(b)(4) . . . cannot be made without an inquiry into whether *under all the surrounding circumstances,* the Union's objective was preservation of work . . . , or whether the arrangement and boycott were tactically calculated to satisfy union objectives elsewhere.

In the application of this principle, it should be noted that the facts comprising the record before the Court of Appeals were not in dispute, nor were such facts in dispute in the trial court (except as to Barker's knowledge regarding Respondent's sale of trucks). However, whether Barker had such knowledge is really immaterial in determining liability in the instant case. The issue of liability in the Court of Appeals was dependent upon Respondent showing that *an* object of the Petitioner's strike against Respondent was proscribed by § 8(b)(4) and not immunized by the work preservation doctrine. Such an object was clearly inferable in this case from the undisputed record facts, which are based on documentary evidence, uncontradicted testimony, stipulated facts and deposition testimony—all of which disclosed the "surrounding circumstances"

into which *National Woodwork* requires inquiry. In this posture, where credibility is not a serious factor, it has been held that the findings of fact of a trial court are not binding on a reviewing court nor are they entitled to significant weight. *Shumaker* v. *Grabowski Industries, Inc.*, 352 F.2d 837 (7th Cir. 1965); *Wigginton* v. *Order of United Commercial Travellers*, 126 F.2d 659 (7th Cir. 1942), *cert. denied* 317 U.S. 636 (1942); Moore's *Federal Practice*, ¶ 52.04, and cases cited in n. 2. Where, as here, an issue exists as to inferences to be drawn from facts which are basically undisputed, the Court of Appeals was free of the "clearly erroneous" rule. *National Latex Products Co.* v. *Sun Rubber Co.*, 274 F.2d 224, 247 (6th Cir. 1959), and cases there cited; *Hillard* v. *Commissioner of Internal Revenue*, 281 F.2d 279, 282 (5th Cir. 1960).

Even if the "clearly erroneous" rule is applicable to the conclusion reached by the trial court—that Petitioner's strike did not have an object violative of § 8 (b) (4), but had as the *sole* object work preservation—the record evidence establishing the "surrounding circumstances" imports a definite and firm conviction, shared by the Court of Appeals, that a mistake was made by the trial court (Pet. App. A-14). Therefore, even if such result could be said to involve only a finding of pure fact (and not a legal inference, a mixed question of law and fact, or a question of ultimate fact), this Court has indicated that such finding may properly be set aside by a court of appeals. *United States* v. *United States Gypsum Company*, 333 U.S. 364 (1948). See also *C.I.R.* v. *Duberstein*, 363 U.S. 278 (1960); *Brown* v. *United States*, 419 F.2d 337 (8th Cir. 1969); *Franks* v. *National Diary Products Corp.*, 414 F.2d 682 (5th Cir. 1969); *Romero* v. *Garcia & Diaz, Inc.*, 286 F.2d 347 (2nd Cir. 1961), *cert. denied* 365 U.S. 869 (1961).

With respect to its determination concerning the object or objects of Petitioner's strike against Respondent, the trial judge concluded that "I cannot rule that [Petitioner's] actions were *inconsistent* with the work preservation objective" (emphasis

added). The basic deficiency in his analysis is that the issue whether Petitioner's actions were inconsistent with a work preservation object was *not* the question the trial court should have resolved. Instead, the relevant determination was whether all evidence concerning the "surrounding circumstances" established that work preservation was the *sole* object of the strike against Respondent. It is well settled that Petitioner was in violation of § 8 (b) (4) where even *one* of the objects of its strike was unlawful despite the existence of one or more other lawful objects. *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 689 (1951).

In application of the foregoing principles, contrary to Petitioner's argument, the Court of Appeals did not overturn the trial court's credibility determination as to when Barker became aware of the sale of Respondent's trucks. Nor did such Court grant Respondent a trial de novo review of the trial court's findings of fact (expressly adopted from the original decision of the district court as to liability, except for when Barker became aware of the sale of Respondent's trucks). Instead, the Court of Appeals concluded that, in addition to a work preservation object, undisputed record evidence established that Petitioner's strike was *also* motivated by unlawful objects. It was therefore not improper for the Court of Appeals to reach this conclusion.

CONCLUSION

For the reasons stated above, the Petition should be denied.

Respectfully submitted,

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